

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1420

**NATIONAL LABOR RELATIONS BOARD,
PETITIONER,**

v.

**NASH-FINCH COMPANY, D/B/A JACK & JILL STORES,
a Delaware corporation authorized to do business
in the State of Nebraska**

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Relevant Docket Entries

UNITED STATES DISTRICT COURT

CIVIL DOCKET 1583

DATE
1969

PROCEEDINGS

Aug 29 1. Complaint with Request for Place of Trial,
Lincoln.

Issued Summons, Orig. & 1, mailed together
with 1 copy of Complaint to U.S. Marshal.

Sep 8 2. Plaintiff's motion for preliminary injunction,
with certificate of service and notice of hearing
on motion on September 12, 1969 at 10:30 A.M.

3. Motion of Amalgamated Meat Cutters and
Butcher Workmen of North America, AFL-CIO,
District Union 271, to intervene as party plain-
tiff, Complaint of Intervenor-Plaintiff attached,
and Certificate of service and notice of hearing
on motion on September 12, 1969 at 9:30 A.M.

p 11 4. Summons, with return. *Total Marshal's costs*
\$27.48

5. Defendant's objections to motion to intervene.

6. Defendant's motion to dismiss.

p 12 Before Hon. Robert Van Pelt, Judge, at Lin-
coln. Hearing on Plaintiff's motion for prelimi-
nary injunction, filed September 8, 1969 (Filing
No. 2); Motion of Amalgamated Meat Cutters
to intervene as party plaintiff, filed September
8, 1969 (Filing No. 3); and Defendant's objec-
tions to motion to intervene, filed September 11,
1969 (Filing No. 4).

Appearances: For Plaintiff, John I. Taylor.
For Defendant, Thomas F. Dowd. For Peti-
tioning Interveners, David D. Weinberg and
Solomon I. Hirsh.

On motion of David D. Weinberg, attorneys
John I. Taylor and Solomon I. Hirsh, admitted
to practice in this court for this case only.

Oral argument. Stipulated that exhibits at-
tached to complaint in file are received in evi-
dence.

DATE
1969

PROCEEDINGS

ORDERED: Submitted.

- p 26 7. Clerk's Court Minutes.
8. Memorandum and Order (RVP) wherein it is Ordered that: Plaintiff's Motion for Preliminary Injunction is overruled and denied; Motion of the Union to Intervene, is overruled and denied, and Defendant's Motion to Dismiss is sustained and Complaint dismissed.
- t. 13 9. Copy mailed to counsel of record.
- t 21 9. Plaintiff's Notice of Appeal.
- t 21 Mailed copy to counsel of record.
- t 21 Proposed Intervenor's Notice of Appeal.
- t 21 Copy to all counsel.
- t 21 Certified copy of Notices of Appeal and two certified copies of all docket entries to date mailed to Clerk, U.S. Court of Appeals, Eighth Circuit.
- Certified copy of all docket entries to date mailed to NLRB, Attn: John I. Taylor, counsel for plaintiff and to counsel for proposed intervenor.
-

UNITED STATES OF AMERICA }
DISTRICT OF NEBRASKA } ss:

I, RICHARD C. PECK, Clerk of the United States District Court for the District of Nebraska, do hereby certify that the annexed and foregoing is a true and full copy of the original of all docket entries to date in Civ. 1583 L, NATIONAL LABOR RELATIONS BOARD v. NASH-FINCH COMPANY, D/B/A JACK & JILL STORES, a Delaware Corporation, authorized to do business in the State of Nebraska, now remaining among the records of the said Court in my office. IN TESTIMONY WHEREOF, I have hereunto subscribed my name and I affixed the seal of the aforesaid Court at Omaha, Nebraska, on this 21st day of October, A.D. 1969.

RICHARD C. PECK
Clerk.

By MARGARET J. TIMM
MARGARET J. TIMM,
Deputy Clerk.

[Caption Omitted in Printing]

COMPLAINT

I

Plaintiff is an agency of the United States created by and charged with the exclusive administration of the National Labor Relations Act, as amended (29 U.S.C. Section 151 *et seq.*)

II

Defendant Nash-Finch Company, d/b/a Jack & Jill Stores (herein the "Company") is a Delaware corporation, which is authorized to and engaged in the retail selling of grocery and related products in Grand Island and Hastings, Nebraska.

III

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1337. The action arises under the National Labor Relations Act.

IV

This is an action for an injunction restraining defendant from, in any manner, seeking to enforce or enforcing certain portions of a temporary injunction issued by the Honorable Donald Weaver of the District Court of Hall County, Nebraska on June 25, 1969, against Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271 (herein the "Union"), and persons in active concert and participation with it. Said injunction, a copy of which is attached hereto as Exhibit "A", enjoins *inter alia*: (1) anyone other than a bona fide member of the Union from picketing unless that person first subjects himself to the jurisdiction of the State Court by becoming a defendant in the State Court proceeding; (2) pickets, who meet the State Court's qualifications, from instigating conversations with the Company's customers in any manner relating to the dispute; (3) anyone, other than qualifying pickets or named defendants from picketing, handbilling or otherwise "caus[ing] to be published or broadcast any information pertaining to the dispute between the parties hereto."

V

On October 9, 1968, the Union filed unfair labor practice charges against the Company alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. Section 158(a)(1) and (5)). Subsequent to the issuance of the unfair labor practice complaint and the statutory hearing, the Trial Examiner found, in a recommended decision issued April 28, 1969, that the Company had violated the Act, *inter alia*, by refusing to bargain with the Union as the exclusive representative of its employees in an appropriate unit (A copy of the Trial Examiner's Decision is attached hereto as Exhibit "B"). Thereafter, the Company filed exceptions to the recommended decision and the case is currently pending decision before the Board.

VI

Approximately one month after issuance of the Trial Examiner's decision, the Union began picketing the Company's Grand Island, Nebraska, stores with signs advising the public that the Union was striking in protest of the Company's unfair labor practices. The Union also distributed handbills to passers-by which stated, in part, that the Company refused to bargain or comply with the findings and recommendations of a National Labor Relations Board Trial Examiner, and urged members of the public not to shop at the Company's stores (A copy of the Union's handbill was attached to the Company's petition in the State Court proceedings, which is attached hereto as Exhibit "C").

VII

On May 27, 1969, the Company filed a petition for injunctive relief (Exhibit "C") in the District Court of Hall County, Nebraska, against the Union, its officers, and certain individual pickets, alleging that the Union's picketing and distribution of handbills were in violation of various Nebraska statutes. On the next day, May 28, the State Court issued a temporary restraining order (Exhibit "D" attached hereto). Thereafter, the Union filed a motion to vacate the temporary restraining order and to dismiss the petition. On June 25, 1969, however, Judge Weaver denied

the motions and issued a temporary injunction (Exhibit A). In addition to the provisions of the injunction described in paragraph 4, the injunction limits the Union to two pickets at each of the Company's stores, and enjoins individual pickets from distributing handbills or literature pertaining to the dispute in any manner which would tend to halt or slow the movement of traffic, blocking or picketing entrances or exits to the store, and "[d]oing any act in violation of Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964."

VIII

Said temporary injunction violates Article VI, Clause 2, of the Constitution of the United States (the Supremacy Clause) since it conflicts with the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 191 *et seq.*). The temporary injunction, *inter alia*, regulates and restrains peaceful picketing or handbilling which is arguably protected or arguably prohibited by the National Labor Relations Act.

WHEREFORE, Plaintiff prays:

1. Defendant be restrained from, in any manner, proceeding under or enforcing these portions of the Nebraska State Court injunction which regulates or restrains conduct which has been pre-empted by the National Labor Relations Act.
2. For such other and further relief as the Court may deem proper.

.....
 MARCEL MALLET-PREVOST
Assistant General Counsel
 National Labor Relations Board
 1717 Pennsylvania Avenue, N.W.
 Washington, D.C.
 382-5384

EXHIBIT A

[Caption Omitted in Printing]

[filed June 25, 1969, M. E. Moses, Clerk]

[I, M. E. Moses, Clerk of District Court of Hall County Nebraska do here by certify the foregoing copy to be a full, true and correct copy of the original record thereof: Now remaining on file in said court; this 25th day of June 1967]

M. E. MOSES

Clerk of District Court

By Margaret Kozel

JOURNAL ENTRY

This matter came on for hearing before the court on June 12, 1969, on plaintiff's application for a Temporary Injunction. Upon evidence adduced and this Court being fully advised in the premises, this Court finds that:

- A. "Pickets" as involved in this action, are persons visibly displaying a sign on the person as set forth in Sec. 28-814.02 of laws of Nebr.;
- B. That identity of individual pickets is necessary for the enforcement of any order of this Court;
- C. That plaintiff is entitled to a temporary injunction of limited scope until the further order of the Court.

It is, therefore, ordered that upon approval of plaintiff's bond:

1. No person other than bona-fide members of defendant union shall engage in picketing unless such person shall have first submitted himself or herself to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;
2. Pickets are limited to two at each Grand Island store location and pickets are enjoined from:
 - (a) Distributing hand bills or literature pertaining to the dispute along or upon public streets and highways in any manner which halts or slows the movement of traffic;
 - (b) Blocking or picketing entrances or exits to plaintiff's retail stores in Grand Island;

- (c) Instigating conversations with plaintiff's customers in any matter relating to the dispute herein;
- (d) Doing any act in violation of Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964.
- 3. That no person, other than a picket or the named defendants, shall, on behalf of defendants, in any manner whatsoever picket or loiter about the premises of plaintiff's Grand Island stores or disrupt ingress and egress thereto, nor display signs or distribute hand bills or literature or cause to be published or broadcast any information pertaining to the dispute existing between the parties hereto.
- 4. Bond to be deposited by plaintiff is fixed in amount of \$5,000.00.

/s/ Donald H. Weaver
DISTRICT JUDGE DONALD WEAVER

June 19, 1969

EXHIBIT B.

[Caption Omitted in Printing]

TRIAL EXAMINER'S DECISION

WILLIAM J. BROWN, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, hereinafter referred to as the "Act," came on to be heard at Grand Island, Nebraska, on February 11 and 12, 1969. The original charge of unfair labor practices had been filed October 9, 1968¹ by the above-indicated Charging Party, hereinafter sometimes referred to as the "Union," and the complaint herein was issued January 7, 1969 by the General Counsel of the National Labor Relations Board acting through the Board's Regional Director for Region 17. It alleged, and the duly-filed answer of the above indicated Respondent, hereinafter sometimes referred to as the "Company," denied the commission of unfair labor practices defined in Sections 8(a)(1) and (5) of the Act.

At the hearing the parties appeared and participated as noted above with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing briefs were received from all parties and have been fully considered. On the entire record herein and on the basis of my observation of the witnesses, I make the following:

*Findings of Fact***I. THE BUSINESS OF THE COMPANY**

The pleadings and evidence indicate and I find that the Company is a corporation organized and existing under and by virtue of the laws of the State of Minnesota and engaged in the business of [2] retail selling of grocery and related products at locations in several midwestern states including locations in Grand Island and Hastings, Nebraska. In the course of its business operations in Nebraska the Company annually receives products valued in excess of \$50,000 and shipped to its Nebraska locations directly from points outside the State of Nebraska. The annual volume of retail sales at the Nebraska locations exceeds \$500,000. I find, as the Company concedes, that it is an employer engaged in

¹ Dates hereinafter relate to the year 1968 unless otherwise indicated.

commerce within the purview of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings and evidence establish that the Union is a labor organization within the purview of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

This case concerns events occurring at the Company's retail stores in Hastings and Grand Island, Nebraska, in late summer and fall of 1968. The Union has had collective-bargaining relations with the Company covering the four Hastings stores² for a substantial number of years prior to 1968 and in August commenced an organizational campaign directed at the Company's three Grand Island locations. The union campaign was directed by Union Representatives Robert Parker and Vernon Allen, the latter being also Union first vice-president. The pleadings establish the appropriateness of the unit involved in the Grand Island locations, viz: all full-time and regular part-time meat market employees employed in the meat department of the Company's Grand Island stores, including meat cutters, meat wrappers and clean-up boys; but excluding office clerical employees, food clerks, guards and supervisors as defined in the Act, and all other employees.

The pleadings also establish the supervisory status of the following Company representatives:

Charles Engh, Superintendent of Retail Operations
 Alvin Gross, Nebraska Division Manager
 Clayton Kent, Zone Store Manager.
 Don Petersen, Head Meat Cutter, West Heights Store
 Jimmie Hansen, Head Meat Cutter, Hillcrest Store
 Wes Kensinger, Head Meat Cutter, West Second Store
 Robert Dawkins, Head Meat Cutter, South Locust Store
 Johnny Roberts, Head Meat Cutter, North Broadwell
 Store

² The Hastings stores are located at West Heights, Hillcrest, West Mall and South Elm; the Grand Island locations are at North Broadwell, West Second and South Locust. The distance between Hastings and Grand Island is about 25 miles.

A. *The Refusal to Bargain*

It appears from a stipulation of the parties (General Counsel's Exhibit 2) that at all material times, i.e., throughout the period August 20 to October 10, the total number of employees in the above-mentioned unit varied between 14 and 16. General Counsel's Exhibits Nos. 3 through 9, inclusive, are union authorization cards signed by seven employees³ [3] who remained members of the bargaining unit at all material times. These seven cards were obtained by Union Representative Parker at a meeting in the Labor Temple in Grand Island on August 20, and constitute an unequivocal authorization of the Union as the signers' bargaining agent. There appears to be no question as to their validity as designations of the Union as the collective-bargaining representative of the signers.

The August 20 meeting at the Labor Temple was attended by Robert Dawkins and Johnny Roberts, meat department managers of the Company's South Locust and North Broadwell stores. Their supervisory status is established by the pleadings. Following the meeting Dawkins visited Ellen Bishop, an employee of the North Broadwell store who knew of Dawkins' supervisory status at the South Locust store. Bishop had previously let it be known that if a majority of employees signed for the Union she would also sign; she understood Dawkins to say on the night of August 20 either that the Union had a majority or that they were pretty sure that they had a majority. She thereupon signed an authorization card (Charging Party's Exhibit 2), her signature being witnessed by Dawkins. In the circumstances of this case it cannot be said that Dawkins, in any realistic sense, solicited her signature nor that his status as a supervisor at a store other than the one in which she worked affected the validity of her card. See *I.T.T. Semi-Conductors, Inc.*, 165 NLRB No. 98, and *Ozark Motor Lines*, 164 NLRB No. 41. I conclude that Bishop's card constituted a valid designation of the Union as her collective-bargaining representative. With respect to the card executed by Marlene Moeller it appears that she was solicited to sign by her fellow-employee Hansen and by her supervisor Roberts. Her testi-

³ The employee-signers are Arthur Hansen, Emma Kammerzell, Stephen Wheeler, Eileen York, Richard Batt, Robert Krebsbach and Barbara Longsine.

mony is, however, that she had previously determined to sign a card if the majority of her fellow-employees did and when she was informed that they had, that was all the information she needed to sign the card. Her testimony also indicates that she had determined to sign sometime before August 20 on the basis of the arguments put forth to her by Hansen. In the circumstances I can only conclude that her decision to sign was completely unaffected by any supervisory influence on the part of Roberts and I conclude that her card was a valid designation of the Union as her bargaining agent.

Helen Green, an employee of the West Second store testified that she signed a union card early in September and gave it to Krebsbach for transmittal to Allen. This card apparently was lost or mislaid and she signed a second card on December 17 (General Counsel's Exhibit 29). It is clear that General Counsel's Exhibit 29 is a replacement for the card she originally signed and I conclude that she must be regarded as one of the card signers for the Union as of early September. In this regard the conclusion reached is buttressed by the fact there appears to be no contest of her signature on General Counsel's Exhibit 28(d) in which she purports to resign from the Union thereby indicating her prior authorization of the Union as her representative.

Thomas Oshlo commenced work as a regular part-time employee sometime about 2 or 3 months prior to August 29 when he signed a union card (Charging Party's Exhibit 1). Present at the time he signed the card were employees Bishop, Moeller and Hansen and Supervisor Roberts. His testimony is that Roberts, who witnessed his signature on the card, [4] did not solicit his signature but merely said that the card was there for him to sign if he wanted to. It appears plain that there was no supervisory influence conditioning or causing his signature and I conclude that his card should be regarded as a valid designation of the Union as of August 29. It appears, however, that he was transferred to the grocery department on August 31 and his card cannot be regarded as an effective designation with respect to the unit here involved subsequent to that date.

It appears that at the time of its original demand on for recognition, which was made by letter from Parker to Engh on August 21 the Union had secured valid authorizations

from nine unit employees and shortly thereafter secured additional authorization cards (Green's and Oshlo's). I conclude that on August 21 and thereafter the Union was the majority representative of employees in the unit at least until October 5 when employees resigned from membership in the Union under circumstances hereinafter set forth.

Parker's August 21 letter requested negotiations for both the Hastings and Grand Island meat market employees and, with respect to the claim therein of majority status at Grand Island, asserted a willingness to submit the authorization cards for a check of the signatures against signatures in the keeping of the Company by a neutral third party. Gross replied by letter of August 31 asserting, in effect, that there was a representation question involved which should be submitted to the Board. On September 3, Parker by letter persisted in meeting with respect to the Hastings employees and on September 6 Gross explained that the representation question related only to Grand Island and that the Company was prepared to meet concerning Hastings. By letter of September 10, Parker proposed a date of September 18 for negotiations, tacitly accepting the limitation contained in Gross' September 6 letter, viz that bargaining would relate only to the Hastings locations. The September 18 date was shifted by mutual agreement to September 23 and on that date Parker, Allen and Tate, the Company's attorney, met in the latter's office. At the September 23 meeting and at another meeting on September 25, there is a conflict in the accounts of Parker and Tate as to whether the discussions related only to Hastings or also embraced other conditions of employment at Grand Island. Allen did not testify on the matter. I credit Tate's testimony that these discussions related only to Hastings and that recognition was not demanded for Grand Island at these meetings. This conclusion also finds support in Tate's letters of September 24 requesting an election and by the filing of the RM petition covering Grand Island on September 25. With respect to the RM petition concerning Grand Island the record indicates that the petition was dismissed by the Regional Director but the reason for dismissal does not appear in the evidence.

At a union meeting on September 4 in Grand Island, a vote was taken on whether or not to strike to obtain the Omaha-Lincoln rates for meat department employees of the

Grand Island and Hastings stores. The vote was unanimous in favor of striking. Gross and Engh were informed of the vote by Head Meat Cutters Dawkins and Hansen. Gross communicated with Engh and sometime towards the end of September consulted the Company attorney respecting the Company's rights in view of reports that employees were dissatisfied with the Union. On September 25 and October 2, [5] RM petitions were filed by the Company covering, respectively, the Grand Island and Hastings Stores, and Gross was advised that it would be permissible for Company officials to provide employees with union membership revocation forms.

Sometime after the September 4 strike vote, Dawkins overheard employees of his South Locust store expressing their dissatisfaction with the imminent possibility of a strike and their desire to get out of the Union. This desire was stirred by employee awareness of the possibility of union fines being imposed for failure to support the Union by honoring picket lines. Gross secured the legal advice that it would be permissible to provide employees with union membership withdrawal forms and he caused to be reproduced (General Counsel's Exhibit 28A-J), withdrawal notices addressed to the Union and signed on October 5 by all the employees of the Grand Island (and some Hastings employees) listed above as having signed union authorization cards. The signers also sent telegrams to the Union expressing their desire to withdraw from membership. The evidence is clear that Dawkins, head meat cutter at the South Locust Store and a supervisor, was the first signer of the withdrawal petition and that Dawkins and Gross visited all three Grand Island stores and advised employees that a strike appeared imminent and that many employees desired to be free to cross picket lines without incurring liability for union fines and that their desires could be attained by signing the forms provided by the Company. The evidence clearly preponderates in favor of the conclusion that the employees were advised that in view of reports of the forthcoming strike and the desires of some employees to continue work despite a strike the Company was providing membership withdrawal forms as a means of enabling employees to decide among themselves whether they wished to utilize the forms as a means of avoiding liability for union fines.

The Company relies on *Clark Control Division of A. O. Smith Corp.*, 166 NLRB No. 55 and *Martin Theatres of Georgia*, 126 NLRB 1054 as requiring the conclusion that the conduct of its supervisors in preparing and presenting to employees the union withdrawal forms constituted no unfair labor practice. But in *Clark Control Division* there was a complete absence of any contemporaneous anti-union campaign and in *Martin Theatres* the Board adopted the Examiner's statements that

"It is well established that an employer may not prepare, circulate or solicit employees' signatures to revocations of union designations. . . . The basic question . . . is whether the employees decide of their own free will, independently of employer solicitation of withdraw their union designations."

In the instant case, while there may have been rumblings of employee concern about the possibility of strike action, it appears clear to me that the Company over-reacted and grasped the opportunity to take affirmative steps to encourage and assist the employees in revocation of their Union designations. Furthermore, as appears hereinafter, there were contemporaneous unfair labor practices in the nature of interference with employee self-organizational rights, which can only be regarded not only as having influenced the climate in which employees were presented with the union revocation forms, but as a rejection of the collective-bargaining principle within the doctrine enunciated *Joy Silk Mills*, 85 NLRB 1263, enf'd 185 F.2d 732, cert. denied 341 U.S. 914. Since the Company admits that it has at all times since August 31, refused to bargain with the [6] Union respecting the Grand Island unit, I find and conclude that it has by such refusal engaged in an unfair labor practice defined within the scope of Section 8(a)(5) of the Act.*

* The Company has denied that the Union sought to bargain subsequent to August 21. The record indicates, however, and I find that Parker, whose testimony I credit in this regard, testified that there was bargaining respecting Grand Island employees in Tate's office on September 25 and that Parker again requested bargaining in a discussion with Gross on October 11 at the North Broadwell store.

B. Interference, Restraint and Coercion

1. Don Petersen

Don Petersen was at all material times the head meat cutter of the West Heights store in Hastings and admittedly a supervisor. The Complaint alleges and the Answer denies that Petersen (1) on or about September 28 informed an employee that the Company desired to organize a meeting to rid itself of the Union; (2) on or about October 7 instructed an employee that he should never speak of the Union, and (3) on or about October 3 at the West Heights store and October 5 at the West Mall and South Elm stores solicited or assisted employees to resign from the Union.

Fern Bonds, a meat market clerk in the West Heights store and a union supporter, testified that Petersen spoke to her in the back room of the store at about 5 o'clock on September 28 and said that Gross and Engh had spoken to him about calling a meeting of employees to sound out their feelings respecting the Union and about the possibility of some form of non-Union representation in view of the fact that the Company could not meet the wages demanded by the Union and might have to close some stores. Don Petersen testified that the conversation of September 28 occurred after he had determined to assemble employees to talk to Gross without the Union participating in the talk. He denied telling her that Gross or Engh asked him to arrange such a meeting. I credit Bonds' account of the conversation. Both Bonds and Petersen were union members at the time of this discussion. Nevertheless, it seems plain that Petersen acted on behalf of management in suggesting to Bonds the possibility of non-Union representation and coupling with the suggestion the threat of store closing in view of the wage demands of the Union. I find that this conversation constituted an intrusion into Bonds' right to be free from such influence in determining her position respecting the Union and constituted an unfair labor practice within the scope of Section 8(a)(1) of the Act.

With respect to the allegation that Petersen on October 7 threatened and instructed an employee never to speak of the Union, Bonds testified that upon her reporting for work Petersen called her to the office and told her that the Union had misled him. When Bonds expressed her continuing

support of the Union, Petersen, according to Bonds, told her that he did not want to hear her discuss the Union anymore. Petersen testified that the conversation became heated, as Bonds conceded, and that he merely expressed his disinclination to argue further with her. He denied forbidding Bonds to mention the Union again. I credit Petersen's account and recommend dismissal of this count of the complaint.

[7] Petersen is also alleged to have solicited and/or assisted employees to withdraw from the Union on October 3 at the West Heights store and on October 5 at the West Mall and South Elm Stores. Zetha Dillon, an employee of the West Mall store, testified that on October 5 Engh, Petersen and Hansen came to her store where Hansen and Petersen told her, in the back room, that they were not happy with Union Representative Parker and they thought employees should drop out of the Union; although her testimony is that Peterson did not ask her to sign the withdrawal form it is clear that Petersen made the petition available for her signature after telling her that the Company disapproved of the Union and thought that employees should reject it. I find that Petersen did in fact on the occasion in question urge her to sign the withdrawal petition and that thereby the Company engaged in unfair labor practices within the purview of Section 8(a)(1) of the Act.

At the West Heights Store where Richard Petersen regularly works 4½ hours per week, Engh, according to Richard Peterson's account, introduced Don Petersen and James Hansen and then left them to talk with him. Don Petersen and Hansen had the withdrawal forms available and expressed their disapproval of the Union. While Richard Peterson testified that he had already decided to withdraw and signed before they finished their discussion, it is also clear from his testimony that Don Peterson and Hansen urged him to sign and facilitated his resignation. I find that their conduct constituted interference with Petersen's statutory right to be free from such employer conduct respecting his actions toward the Union.

2. Charles Engh

Engh is alleged to have, on October 3 at the West Heights store, interrogated an employee concerning his union activ-

ities. Fern Bonds, a clerk in that store, testified that Engh spoke to her in the back room on October 3 and asked her why she thought she needed the Union. When she replied that she felt she needed it for her protection, Engh, according to Bonds, replied that that indicated a poor relationship. Engh testified that the conversation in question took place on the selling floor and that after he told her of the filing of the RM petition Bonds stated that she still thought she needed a union to represent her. He denied questioning her in any way. I credit Bonds' account of the matter and find that on the occasion in question Engh interrogated in a manner and under circumstances constituting interference, restraint and coercion within the scope of Section 8(a)(1) of the Act.

The complaint also alleges that on October 25, at the North Broadwell store Engh urged or instructed employees not to attend union meetings. Ellen Bishop, a wrapper at the North Broadwell store and, as noted above, a union card signer, testified that on October 25, in the course of a discussion about paychecks either Gross or Engh, both being present, advised her not to attend a union meeting because a light attendance might discourage the Union. Engh did not testify on this matter and Gross' testimony is that he merely advised employees that other employees had decided not to attend union meetings. I credit Bishop's testimony that either Gross or Engh advised her not to attend a forthcoming meeting so that a light attendance might discourage the Union. By such advice the Company engaged in interference with employee rights protected under the Act.

[8] Engh is also alleged to have solicited or assisted employees to resign from the Union on October 3 and 5 at the South Elm store and on October 5, at the West Mall store. Mildred Fox testified that on October 3, Engh talked to her in the West Mall store where she worked and said that they would have a better relationship without the Union. On October 5, she testified, Engh, together with Petesen and Hansen, talked to her and asked her to sign a paper of resignation from the Union. Engh did not deny these charges and I find that on October 3 and 5 Engh solicited an employee to resign from the Union thereby engaging in unfair labor practices within the scope of Sec-

tion 8(a)(1) of the Act. The evidence is lacking with respect to similar activities at the South Elm store and I recommend dismissal of the allegations of the complaint in that respect.

3. Wes Kensinger

Kensinger, manager of the West Second store in Grand Island, is alleged on or about October 5 to have threatened employees with reprisals if the Union became the bargaining representative. I am cited to no evidence of record to support this allegation and find none. I recommend that it be dismissed.

4. Alvin Gross

Gross is alleged to have urged employees not to attend union meetings on October 7 at the West Mall store and on October 25 at the North Broadwell store. He is also alleged to have promised employees at the West Second store on or about August 22, benefits as an inducement not to support the Union, to have instructed employees of the West Mall store on October 7 and employees of the North Broadwell store on October 25 not to attend union meetings and to have solicited or assisted employee resignations from the Union on October 5 at the North Broadwell and West Second stores.

With respect to the August 22 promise of benefits at the West Second store, employee Richard Batt, a somewhat reluctant witness, testified that shortly after he signed a union card on August 20, Gross and Engh were talking to him in the store basement about the union campaign and in the course of the discussion, Gross said, after Batt complained that Safeway and Hinky Dinky paid higher wages, that the Company employees would be satisfied with what the Company would do after the union campaign was over. General Counsel cites cases said to be in support of the conclusion that such an utterance constituted interference, restraint and coercion. I do not read the cited cases as supporting this view and I find that Gross' totally ambiguous statement cannot realistically be regarded as an unfair labor practice.

With respect to the solicitation of or assistance in union membership withdrawals on October 5 at the North Broadwell and West Second stores, Bishop and Hansen, North

Broadwell employees, testified that on or about October 5, Gross stated that they did not need a third party to handle their problems and presented them and other employees with the union withdrawal form with the explanation that if the employees signed they could cross a union picket line without fear of being fined. Later that day Bishop signed but Hansen did not. The presentation of such a petition coupled with argumentation in favor of employee signing appears to be an unwarranted interference into employee rights to be free of employer influence in the matter of joining and assisting the Union and constituted an unfair labor practice within the scope of [9] Section 8(a)(1) of the Act. With respect to the West Second store, Helen Green and George Batt testified that Gross presented them with the union withdrawal form and said that their signatures thereon would protect them against union fines in the event it became necessary to cross a picket line. Although Batt conceded that Gross did not say that employees had to sign, it is clear that Gross presented the petition with arguments in favor of signing and I find that his words and actions constituted interference with employee rights and violated Section 8(a)(1) of the Act.

5. James Hansen

Hansen, head meat cutter at the Hillcrest store in Hastings, is alleged to have solicited or assisted employees to resign union membership on October 5 at the South Elm and West Mall stores. Mildred Fox, a West Mall meat wrapper, testified that on October 5 Hansen and Engh asked her to sign the union withdrawal form because they felt that they did not need the Union. Richard Peterson, a part-time employee at West Mall, testified to the same effect. Hansen, who appears to have spearheaded the Union withdrawal program, did not contradict the accounts of Fox and Peterson. I find that Hansen solicited their signatures on the union withdrawal forms and thereby engaged in interference within the scope of Section 8(a)(1) of the Act.

With respect to Hansen's activities at the South Elm store on October 5, Hansen himself testified that he circulated the union withdrawal form but denied telling employees that they had to sign the petition. I find that

Hansen's circulation of the petition in connection with Engh's exhortation to employees to sign constituted interference within the scope of Section 8(a)(1).

6. Robert Dawkins

Dawkins, head meat cutter at the South Locust store and a supervisor, is alleged to have solicited or assisted employees to resign union membership on October 5 at the North Broadwell and West Second stores. Helen Green testified that Dawkins was among the supervisory group who visited her store at West Second on October 5, and presented her and others with the union withdrawal form. She testified that Dawkins urged her to sign as a means of avoiding big fines. Dawkins conceded that he signed the petition and helped circulate it. I find that Dawkins assisted in the procuring of signatures on the withdrawal petition and thereby engaged in acts of interference within the scope of Section 8(a)(1) of the Act.

As to the North Broadwell store, Ellen Bishop testified that Dawkins was among the group who spoke to her and others in the backroom of the store and presented her and the others with the membership withdrawal form to sign as a means of avoiding liability for fines in the event of picketing. By this action Dawkins intruded into matters reserved under the Act for decision of employees without management interference and I find that on this occasion the Company, through Dawkins, engaged in an unfair act of interference within the scope of Section 8(a)(1) of the Act.

[10] IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section III, above, and there found to constitute unfair labor practices, occurring in connection with the business operations of the Company as set forth in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing such commerce and the free flow thereof.

V. THE REMEDY

In view of the findings set forth above to the effect that the Company has engaged in unfair labor practices affecting commerce it will be recommended that it be required to cease and desist therefrom and from like or related unfair labor practices and take such affirmative action including recognition of and bargaining with the Union respecting its Grand Island stores, as appears necessary and appropriate to effectuate the purposes and policies of the Act.

On the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act;

2. The Union is a labor organization within the meaning of Section 2(5) of the Act;

3. All full-time and regular part-time meat market employees employed in the meat department of the Company's Grand Island Stores, including meat cutters, meat wrappers and clean-up boys; but excluding office clerical employees, food clerks, guards and supervisors as defined in the Act constitute a unit appropriate for purpose of collective bargaining under the Act;

4. At all material times the Union has been and is the exclusive representative of all employees in the aforesaid appropriate unit for purposes of collective bargaining within the meaning of Section 9 of the Act;

5. By refusing from and after August 31, 1968 to bargain collectively with the Union as exclusive representative of employees in the aforesaid appropriate unit the Company has engaged and is engaging in unfair labor practices defined in Section 8(a) (5) and (1) of the Act;

6. By suggesti[ng] the substitution of non-Union in place of union representation, by soliciting employee revocation of prior union authorizations as bargaining agent, by advising employees not to attend union meetings and by coercively interrogating employees concerning union representation the Company has engaged in unfair labor practices defined in Section 8(a) (1) of the Act;

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[11]

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that the Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:
 - (a) Soliciting employee revocation of Union designation cards, suggesting the substitution of non-union for Union representation, advising employee not to attend union meetings, coercively interrogating employees concerning Union representation.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.
2. Take the following affirmative action which appears necessary and appropriate to effectuate the policies of the Act:
 - (a) Union request, bargain collectively with the Union as exclusive representative of employees in the unit found appropriate as above and embody any understanding reached in a signed memorandum of agreement;
 - (b) Post at the Company's Grand Island and Hastings stores copies of the notice attached hereto and marked "Appendix."⁵ Copies of said notice, on forms provided by the Board's Regional Director for Region 17, shall, after being duly signed by an authorized representative of the Company, be posted immediately upon receipt thereof and maintained thereafter for a period of 60 consecutive days in conspicuous places

⁵ If these Recommendations are adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommendations of a Trial Examiner" in the notice. If the Board's Order is enforced by a decree of the United States Court of Appeals, the notice will be further amended by the substitution of the words "A Decree of the United States Court of Appeals Enforcing an Order" for the words "A Decision and Order."

including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced or covered by other material;

- (c) Notify the Regional Director for Region 17, in writing, within 20 days* from receipt of this Decision and Recommended Order what steps have been taken to comply herewith.

It is recommended that the complaint here be dismissed as to allegations therein of unfair labor practices not herein specifically found to have been engaged in.

Dated at Washington, D.C., Apr. 28, 1969.

/s/ William J. Brown
Trial Examiner

* If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

**THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD**

**AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NATIONAL LABOR RELATIONS ACT**

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT REFUSE TO BARGAIN COLLECTIVELY with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271 and we will on request bargain collectively with the aforesaid union as exclusive representative of our employees in the following appropriate unit:

All full-time and regular part-time meat market employees employed in the meat department of our Grand Island stores, including meat cutters, meat wrappers and clean-up boys but excluding office clericals, food clerks, guards and supervisors.

WE WILL sign a written contract embodying any agreement resulting from such collective bargaining.

WE WILL NOT interfere with employee rights under the Act by coercively questioning employees about their Union activities, by suggesting forms of non-union representation, by soliciting employees to revoke their Union membership or by advising employees not to attend Union meetings.

NASH-FINCH COMPANY, d/b/a JACK & JILL STORES
(Employer)

Dated..... By
Representative (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106 (Tel. No. 816-374-5282).

EXHIBIT C

[Caption Omitted in Printing]

PETITION

[No. 16860]

Comes now the Plaintiff and for its cause of action against the defendants alleges:

1. That the Plaintiff is a corporation organized and existing under the laws of the State of Delaware authorized to conduct business in the State of Nebraska.

2. That the defendant Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, hereinafter referred to as District Union No. 271, is an unincorporated association existing for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Defendant Robert J. Parker is a business representative of District Union No. 271. Defendant Vernon Allen is a business representative and first vice-president of District Union No. 271. Defendant Chester W. O'Hara is the president of District Union 271. Defendant J. B. DeFontain is the secretary-treasurer of District Union No. 271. Defendants John Doe and Mary Doe, real and true names unknown, are pickets, agents, employees and servants of District Union No. 271.

3. That on May 23, 1969, defendants commenced picketing and continue to picket plaintiff's three retail grocery establishments located in Grant Island at 2121 North Broadwell, 1717 West Second Street, and 1515 South Locust Street.

4. That during the course of the aforesaid picketing, defendants have engaged in the following acts and conduct:

- (a) Picketing the entrances and exits of plaintiff's retail stores by means of more than two pickets at the same time within 50 feet of said entrances and exits
- (b) Picketing by means of more than two pickets at the same time within 50 feet of each other.
- (c) Stopping, blocking, and preventing the free ingress egress of the public to and from the picketed premises.

5. That the foregoing acts and conduct of defendants constitutes mass picketing as proscribed by Section 28-814.02, R.R.S. Neb. 1943, Reissue 1964.

6. That said picketing is conducted by the display of signs bearing the following legend:

“Amalgamated Meat Cutters, District Union No. 271, AFL-CIO, on strike, protesting unfair labor practices, Nash-Finch Company, Jack & Jill Stores. This dispute with the above named employer only,”

and the distribution of handbills to the public, a copy of which is attached hereto marked Exhibit A, and by this reference made a part hereof.

7. That the above representations to the public that a strike exists and that plaintiff has engaged in unfair labor practices constitutes false and malicious statements proscribed by Section 28-440, R.R.S. Neb., Reissue 1964.

8. That during the course of said picketing, defendants have threatened, intimidated, and coerced the public and plaintiff's customers by the following acts and conduct:

(a) Threatening customers with property loss if they patronize plaintiff's establishments.

(b) Using profane and vulgar language and addressing motorists and plaintiff's customers in a loud, boisterous manner when insisting that they patronize plaintiff's competitors.

9. That during the course of said picketing, defendants have slandered plaintiff's business reputation in the community by falsely and maliciously telling plaintiff's customers that, “There are ants in the meat products.”

10. That by reason of the foregoing unlawful picketing and other conduct, plaintiff's operations at its three retail establishments in Grand Island, Nebraska, have been disrupted and the business of the plaintiff has been substantially impaired and diminished. Unless the Restraining Order and Injunction prayed for herein is granted, plaintiff will be further injured and damaged as a result of defendants aforesaid unlawful picketing and other conduct. Plaintiff is suffering immediate and irreparable damage as a result of defendants acts and conduct, and plaintiff does not have an adequate and complete remedy at law.

11. This Court has jurisdiction to enjoin acts and conduct which are violative of the laws of the State of Nebraska,

irreparably damage the business reputation of the company, and which breaches the peace of the community by creating an atmosphere of public intimidation, restraint, and coercion.

WHEREFORE, the Plaintiff prays for relief as follows:

- (a) That this Court issue a temporary Restraining Order enjoining defendants, its members and agents, and all persons acting in its behalf from picketing and striking plaintiff's three retail stores in Hall County Nebraska, and from otherwise interfering by picketing, striking or other conduct with plaintiff's operations and business in Hall County Nebraska.
- (b) That the Court set this matter for hearing for a Temporary Injunction and that upon such hearing the Court enter its Temporary Injunction continuing said restraining order in effect until trial may be had.
- (c) That upon trial the Court enter its Final and Permanent Injunction enjoining the defendants in like manner as in aforesaid Restraining Order.
- (d) That this Court grant such other relief as in the premises seems just and equitable and award costs of this action to plaintiff.

Dated this 27th day of May, 1969.

NASH-FINCH COMPANY, d/b/a, THOMAS F. DOWD
 JACK & JILL STORES, *Plaintiff* 515 Executive Building
 Omaha, Nebraska
 Its Attorney

By: Thomas F. Dowd

[*Verification Omitted in Printing*]

EXHIBIT A

To The Public

JACK & JILL STORES

(of NASH-FINCH COMPANY)
Grand Island, Nebraska

Are On Strike

**Protesting Unfair Labor Practices
Of This Company**

THIS COMPANY REFUSES TO BARGAIN OR COMPLY WITH
OTHER FINDINGS AND RECOMMENDATIONS OF A TRIAL
EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD.

**Please Help Us By Not
Shopping at Jack & Jill Stores
Or Any Other Stores Operated By This Company During This Strike**

*District Union 271 of the
Amalgamated Meat Cutters & Butcher
Workmen of North America, AFL-CIO*

EXHIBIT D

[Caption Omitted in Printing]

RESTRAINING ORDER

This matter came on for hearing on May 28, 1969, upon the Court's Order to Show Cause why a temporary restraining order should not be issued against the Defendants, and each of them, as requested by the Plaintiff in its duly verified Petition, restraining Defendants from picketing Plaintiff's retail stores in Hall County, Nebraska, or otherwise interfering with the Plaintiff's business in Hall County, Nebraska, and the Court being fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that until further order of this Court, a Restraining Order is allowed restraining the Defendants, and each of them, from distributing the handbills, a copy of which is attached to Plaintiff's Petition and marked Exhibit A; blocking the entrances or exits of Plaintiff's retail stores in Grand Island, Nebraska; conversing with Plaintiff's customers; picketing the entrances and exists of Plaintiff's retail stores in Grand Island, Nebraska, by means of more than two pickets; distributing handbills by persons not carrying or exhibiting a picket sign; and picketing in violation of Sections 28-812, 28-814.01, and 28-814.02, R. S. Neb., Reissue of 1964.

IT IS FURTHER ORDERED that Plaintiff's application for a temporary injunction as requested in its Petition be set for hearing on June 8, 1969, at 9:30 a.m. in the Hall County District Court, Hall County Court House, Grand Island, Nebraska and that said Defendants appear and show cause why the temporary injunction as requested should not be issued.

BY THE COURT:

APPROVED AS TO FORM:

DONALD H. WEAVER,
District Judge

/s/ Thomas F. Dowd
THOMAS F. DOWD,
Attorney for Plaintiff

/s/ David D. Weinberg,
DAVID D. WEINBERG,
Attorney for Defendants

[*Caption Omitted in Printing*]

NOTICE OF MOTION

Please take notice that the attached motion for preliminary injunction will be brought on for hearing on September 12, 1969, before the Honorable Robert Van Pelt, or any other judge who may be sitting in his place and stead, at 10:30 a.m., United States Court House, Lincoln, Nebraska, at which time and place you may appear if you so desire.

/s/ **Marcel Mallet-Prevost**
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

Dated at Washington, D. C.
this 5th day of September, 1969.

[Caption Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves this Court for a preliminary injunction enjoining the defendant Nash-Finch Company, d/b/a Jack & Jill Stores, its agents, servants, employees and attorneys and all persons in active concert and participation with it, from in any manner enforcing or seeking to enforce the following provisions of an injunction issued, upon application of the defendant, by the Honorable Donald Weaver of the District Court of Hall County, Nebraska, on June 25, 1969, against Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271 ("Union"):

- "1. No person other than bona-fide members of defendant union shall engage in picketing unless such person shall have first submitted himself or herself to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;
2. Pickets are * * * enjoined from:
 - (c) Instigating conversation with plaintiffs [Nash-Finch's] customers in any matter [sic] relating to the dispute herein;
 - (d) Doing any act in violation of Section 28-812, 28-814.01, 28-814.02, R.S. Neb. 1964.
3. That no person, other than a picket or the named defendants, shall, on behalf of defendants, in any manner whatsoever picket or loiter about the premises of plaintiffs Grand Island stores . . . , nor display signs or distribute handbills or literature or cause to be published or broadcast any information pertaining to the dispute existing between the parties hereto."

The grounds in support of this motion, as more fully set forth in the complaint filed with this Court on August 29, 1969 (Civil Action No. 1583L) and in the memorandum submitted with this motion, are that:

- (1) The portions of the State Court injunction complained of are invalid in that they violate Article VI, Clause 2, of the Constitution of the United States (the Supremacy Clause) since they seek to enjoin and regulate peaceful picketing or handbilling growing out of a labor dispute, conduct which falls within the exclusive jurisdiction of the National Labor Relations Act;

(2) Unless restrained by this court defendant will continue to enforce the provisions of said injunction objected to herein;

(3) Such action by defendant is contrary to the public interest as set forth by Congress in the National Labor Relations Act and will result in irreparable injury to the employees' rights under the National Labor Relations Act to engage in peaceful picketing.

WHEREFORE, for the reason set forth in the complaint, and in this motion, together with the attached memorandum, plaintiff moves this honorable Court for a preliminary injunction.

Dated at Washington, D. C.,
Sep. 5, 1969

/s/ Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

[Caption Omitted in Printing]

NOTICE OF MOTION

TO: MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

THOMAS F. DOWD
515 Executive Building
Omaha, Nebraska

Please take notice that the undersigned will bring the attached Motion to Intervene on for hearing before the United States District Court sitting in Lincoln, Nebraska on September 12, 1969, at 9:30 a.m., or as soon thereafter as counsel can be heard.

JACOBS AND GORE. /s/ Solomon I. Hirsh
201 N. Wells St. SOLOMON I. HIRSH
Chicago, Illinois Counsel for Intervenor-Plaintiff
372-1646

[Caption Omitted in Printing]

MOTION TO INTERVENE

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, by its attorneys, Jacobs and Gore, respectfully moves the Court for leave to intervene as a party plaintiff in the case under Rule 24(a)(2) or 24(b)(2), F.R. Civ. P. In support of its motion, the Union shows as follows:

1. This is a suit by the National Labor Relations Board to enjoin Nash-Finch Company from seeking to enforce, or enforcing, certain portions of a temporary injunction against the Union which the Company secured from the Hall County District Court. The Board is bringing the suit because the State Court injunction violates rights of the Union, its members and sympathizers which are protected by the National Labor Relations Act and which the States are therefore precluded from regulating or abridging.

2. The Union has substantial, direct and immediate interest in the outcome of this litigation. The granting or denial of relief will affect the Union's right to publicize its dispute with the Company in order to enlist public support in its campaign to induce the Company to obey the National Labor Relations Act and cease the unfair labor practices which a Board trial examiner found the Company has committed.

3. The Union is entitled to intervene as a matter of right, under Rule 24(a)(2), F.R. Civ. Pr. As the defendant in the State Court litigation, which is the subject matter of this suit, the Union "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect" its interest in having the State Court injunction vacated (quoting from Rule 24(a)(2)). See *Kozak v. Wells*, 278 F. 2d 104, 110. (8 Cir. 1960). A decision against the Board in this case could be used by the Company in the State Court litigation to rebut the Union's claim that the Company's suit is trenching on Federally protected rights.

Moreover, the Union's interest may not be adequately represented by the Board. The Board is charged with protecting the "public interest" expressed in the National Labor Relations Act, but there are "private interests" which are also at stake, and the two are at times separate and distinct. For that reason, the Supreme Court recently

held that intervention should be granted to the successful charging partly in unfair labor practice cases coming before the Courts of Appeals under Section 10(e) of the Act (29 U.S.C. Sec. 160(e)). *International Union, U.A.W. v. Scofield*, 382 U.S. 205, 217-221 (1965). The same reasoning applies here. Thus, for example, while challenging the breadth of the injunction the Company secured from the State Court, the Board has not seen fit to challenge the statutes upon which the Company's complaint and the injunction are predicated. It is in the Union's interest to secure a ruling on the validity of those statutes, for their continued existence and threatened application against the Union daily serves to inhibit the Union in the exercise of rights guaranteed to it by the National Labor Relations Act and the First and Fourteenth Amendments to the Constitution of the United States.

4. In the event the Court is of the opinion that the Union is not entitled to intervene as a matter of right under Rule 24(a)(2), we urge that the Union be permitted to intervene under Rule 24(b)(2). The Union's claim clearly presents questions of law and fact in common with the main action. In the preceding paragraphs of this motion, we have shown the substantial interest the Union has in the outcome of this litigation, and therefore request that the Union be permitted to participate in it. Intervention will not delay or prejudice the rights of the original parties to this action.

WHEREFORE, the Union prays that its motion to intervene as a party plaintiff be granted.

/s/ Solomon I. Hirsh
 SOLOMON I. HIRSH
 JACOBS AND GORE
 201 North Wells Street
 Chicago, Illinois 60606

and

DAVID D. WEINBERG
 300 Keeline Building
 Omaha, Nebraska 68102
 Attorneys for Plaintiff-
 Intervenor

Of Counsel:
 JACOBS AND GORE
 201 North Wells Street
 Chicago, Illinois 60606

[Caption Omitted in Printing]

COMPLAINT OF INTERVENOR-PLAINTIFF

1. Intervenor-Plaintiff, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (29 U.S. C. Section 152 (5)).

2. Defendant, hereinafter referred to as the Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is engaged in the business of retail selling of grocery and related products at locations in Grand Island, Nebraska. The Company is engaged in commerce, or a business affecting commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act (29 U.S.C. 152 (6) and (7)).

3. The Court has jurisdiction under 28 U.S.C. Sec. 1337, the National Labor Relations Act (29 U.S. C. Sec. 151, *et seq.*), and the First and Fourteenth Amendments to the Constitution of the United States.

4. The Union adopts and incorporates in this complaint paragraphs V and VI of the Board's complaint.

5. On May 27, 1969, the Company filed a petition for injunctive relief in the District Court of Hall County, Nebraska, against the Union, its officers, and certain individual pickets alleging, *inter alia*, that the Union was picketing by means of more than two pickets at the same time within 50 feet of the entrances and exits to the Company's stores, and within 50 feet of each other. Said picketing was alleged to constitute "mass picketing" as defined and proscribed by Section 28-814.02, R.R.S. Neb. 1943, Reissue 1964.

6. The Company also alleged that the Union's signs and handbills advised the public that the Union was on strike protesting the Company's unfair labor practices, and that such statements constitute false and malicious statements proscribed by Section 28-440, R.R.S. Neb., Reissue 1964.

7. On May 28, the State Court, per Judge Donald H. Weaver, issued a temporary restraining order. Thereafter the Union filed a motion to vacate the temporary restraining order and to dismiss the petition for lack of jurisdiction and failure to state a claim warranting relief. On June 25, 1969, Judge Weaver denied the motions and issued a temporary injunction.

8. The temporary injunction, *inter alia*, prohibits anyone from picketing who is not a bona-fide member of the Union.

unless said person first submits himself to the jurisdiction of the Court by filing a general appearance as a defendant in the case; limits the number of pickets to two at each store; prohibits pickets from "instigating conversation with plaintiff's customers in any matter relating to the dispute herein;" bars them from "doing any act in violation of Section 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964;" and prohibits anyone other than a picket or the named defendants from, on behalf of the defendants, picketing the Company's premises, or displaying signs or distributing handbills or literature "or caus[ing] to be published or broadcast any information pertaining to the dispute existing between the parties hereto."

9. Section 28-812 R.S. Neb. 1964 provides:

28-812. *Picketing, defined; unlawful.* It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, indecent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purposes; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the place of work or residence of such person, or any street, alley,

road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

10. Section 28-814.01 and .02 R.S. Neb, 1964 provides:

28-814.01. *Mass picketing; unlawful.* It shall be unlawful for any person, singly or in concert with others, to engage in or aid and abet any form of picketing activity that shall constitute mass picketing as defined in section 28-814.02.

28-814.02. *Mass picketing; definition display of sign required.* (1) Mass picketing means any form of picketing in which there are more than two pickets at any one time within fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

11. Section 28-812, quoted above, on its face prohibits peaceful picketing for lawful purposes without the consent of the person picketed; in this case, such prohibition conflicts with the National Labor Relations Act and is therefore void under Article VI, Clause 2 of the Constitution (the Supremacy Clause); such prohibition also imposes unreasonable restraints upon freedom of speech, press and assembly, in violation of the First and Fourteenth Amendments to the Constitution.

12. Insofar as Subsection (1) of Section 28-814.02 defines "mass picketing" as "any form of picketing in which there are more than two pickets at any one time within either fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets," and bars such picketing regardless of the factual circumstances in any particular case, it is void under Article VI, Clause 2 of the Constitution since it conflicts with the National Labor Relations Act, and it imposes unreasonable restraints upon freedom of speech in violation of the First and Fourteenth Amendments to the Constitution.

13. Subsection (2) of Section 28-814.02, quoted above,

by purporting to regulate the content of picket signs and the size of type said signs are to use, is void in this case under Article VI, Clause 2 of the Constitution since it conflicts with the National Labor Relations Act, and it imposes unreasonable restraints upon freedom of speech in violation of the First and Fourteenth Amendments to the Constitution.

14. In seeking and obtaining the foregoing injunction, the Company has violated the rights of the Union, its members and supporters as prescribed and protected by Sections 7 and 13 of the National Labor Relations Act (28 U.S.C. Secs. 157 and 163), and as prescribed and protected by the First and Fourteenth Amendments to the Constitution.

WHEREFORE, the Union, Plaintiff-Intervenor herein, prays:

1. Defendant be restrained from, in any manner, proceeding under or enforcing those portions of the Nebraska State Court injunction which regulates or restrains conduct, the regulation of which has been preempted by the National Labor Relations Act;

2. Defendant be restrained from, in any manner, proceeding under or enforcing those portions of said State Court injunction which regulates or restrains conduct protected by the First and Fourteenth Amendments to the Constitution;

3. A declaratory judgment issue declaring that the portions of Section 28-812 and 28-814.02 set forth in paragraphs 11, 12, and 13 above, are unconstitutional, unenforceable and void;

4. Defendant be assessed the costs of this action;

5. Such other and further relief as the Court may deem just and necessary.

/s/ Solomon I. Hirsh
SOLOMON I. HIRSH
JACOBS AND GORE
201 N. Wells St.
Chicago, Illinois 60606
and

Of Counsel:

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*Attorneys for Plaintiff-
Intervenor*

[Caption Omitted in Printing]

OBJECTIONS TO MOTION TO INTERVENE

COMES Now the Defendant, Nash-Finch Company d/b/a Jack & Jill Stores by and through its Attorney, Thomas F. Dowd, and objects to the Motion to Intervene filed by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, herein called the Union, pursuant to Rule 24 (a)(2) or 24 (b)(2) of the Federal Rules of Civil Procedure for the following reasons:

1. That the Union is not so situated that the disposition of the main action will as a practical matter impair or impede its ability to protect its interest since it would not be bound by any judgment in this action and would be able to continue to defend its position in the State Court and, if unsuccessful, avail itself of judicial review. See *National Labor Relations Board v. Swift & Company*, 130 F. Supp 214 (D.C. Mo. 1955), mod. on other grounds 233 F.2d 226 (8th Cir. 1956).

2. That the Union, as evidenced by the allegations in the proposed Complaint of Intervenor-Plaintiff, seeks to enlarge the issues of the main action by attacking the constitutionality of certain Nebraska Statutes and thus has advanced a claim which presents no question of law or fact in common with the main action.

NASH-FINCH COMPANY, d/b/a
JACK & JILL STORES,
Defendant

By Thomas F. Dowd
Its Attorney

THOMAS F. DOWD for the firm of
NELSON, HARDING, RICHLING, LEONARD &
TATE, 515 Executive Bldg. Omaha.

[Caption Omitted in Printing]

MOTION TO DISMISS

COMES Now the Defendant pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and moves the Court to dismiss the Complaint filed herein for the reason that Title 28, United States Code, Section 2283, deprives the Court of jurisdiction to grant the prayer of Plaintiff's Complaint.

In support of Defendant's Motion to Dismiss, the Court's attention is directed to *National Labor Relations Board v. Swift & Company*, 233 F.2d 226 (8th Cir. 1956) which Defendant suggests to be controlling authority for granting said Motion.

By Thomas F. Dowd

Its Attorney

THOMAS F. DOWD for the firm of
NELSON, HARDING, RICHLING,

LEONARD & TATE

515 Executive Building
Omaha, Nebraska, 68102

NASH-FINCH COMPANY, d/b/a

JACK & JILL STORES,

Defendant

[Caption Omitted in Printing]

MEMORANDUM and ORDER

VAN PELT, Judge

Filed Sep. 26, 1969

This matter comes before the Court on the motion of the National Labor Relations Board for a preliminary injunction to prevent the Nash-Finch Company (doing business as Jack & Jill Stores) from enforcing a state court injunction issued by the District Court of Hall County, Nebraska. The state court injunction restrains certain actions of individuals engaged in picketing Jack & Jill Stores in Grand Island, Nebraska. The picketing in question occurred during an attempt by Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, District Union 271 to organize the meat cutters employed by Jack & Jill.

Also before the Court is the motion of Amalgamated to intervene as a party plaintiff in this action. Finally, Nash-Finch has filed a motion to dismiss the complaint. By agreement of counsel, all three motions were argued at a hearing held before this Court on September 12. The court, at the conclusion of that hearing, took submission of the motions. The matters raised by the motions now stand ready for determination.

It is the opinion of the Court that the jurisdictional question raised by the defendant, Nash-Finch, is dispositive of the case. We turn now to an examination of the power of this Court to grant the relief that the N.L.R.B. requests.

This matter is properly before this court under 28 U.S.C.A. § 1337 giving jurisdiction of questions arising under an Act of Congress to the District Courts. The National Labor Relations Act is such an Act. *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954).

However, in the instant case, this court is asked to restrain the enforcement of a state court injunction. In such a situation, there is a rigid limitation on the power of this court to act. 28 U.S.C. § 2283 provides:

"A Court of the United States may not grant an injunction to stay proceedings in a State Court except as authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The history of Section 2283 indicates that it is to be strictly construed and a particular case must be within the excep-

tions that are set out by the statute in order for an injunction to issue. *Amalgamated Clothing Workers of America, et al. v. Richmond Brothers, Co.* 348 U.S. 511 (1955). Thus, in order for the relief herein requested to be granted, the N.L.R.B. must bring itself within one of the above noted exceptions to Section 2283 or, in the alternative, show that this section does not apply in the instant case.

The N.L.R.B. offers three arguments to the effect that this Court has the authority to issue the injunction that is asked for. First, the Board argues that under the rationale of *Leiter Minerals, Inc. v. U.S.*, 352 U.S. 220 (1957), when the United States is the party applying for an injunction restraining state court proceedings, Section 2283 does not apply. Thus, the Board as an agency of the United States Government would also be excluded from the prohibition of Section 2283.

Secondly, it is argued that Section 2283 does not apply here as the state court is wholly without jurisdiction over the subject matter in that it has invaded a field preempted by Congressional legislation. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Finally, it is the Board's contention that the picketing in question is involved with the organizational activities which have been continuing over a period of time. In connection with these activities, an unfair labor practice charge has been filed with the Board by the Union. 29 U.S.C.A. §§ 160 (j) and (l) authorize the Board to seek injunctive relief in specific circumstances concerning unfair labor charges. Thus, the Board argues, if this Court finds Section 2283 applicable to the instant case, the questioned activities are within the ambit of sections (j) and (l) and therefore within the "as authorized by an Act of Congress" or the "in aid of its jurisdiction" exceptions to Section 2283. *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954).

In examining the first contention of the Board, it is noted that the Court of Appeals for this Circuit has held that the Board did not stand in the position of the United States for the purposes of determining the applicability of Section 2283 in a suit for injunctive relief. *N.L.R.B. v. Swift & Company*, 233 F. 2d 226 (8th Cir. 1956). It is the position of the Board, however, that the United States Supreme Court's decision in *Leiter Minerals, Inc.*, *supra*, has under-

mined the Court of Appeal's holding on this point. We believe that a careful examination of *Leiter* and other relevant cases in this area does not bear out this contention.

We begin with the proposition that the intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 312 U.S. 81 (1941). The Court of Appeals in *Swift & Company, supra*, found that

"The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283." *Id* at 232.

We are of the opinion that in the instant case the Board has not established that it was the intention of Congress to bring it within the immunity of the United States insofar as concerns section 2283. While the *Leiter* case does establish the inapplicability of section 2283 to the United States, we find no justification in extending this doctrine to the National Labor Relations Board as an agency of the Government. To be considered is Mr. Justice Frankfurter's statement in *Amalgamated Clothing Workers, supra*, at 514 where he considers the import of the 1948 amendment to the predecessor of section 2283 which represents the section as it appears today.

"By that enactment, Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."

We also are of the opinion that the Supreme Court's decision in *Amalgamated*, while bearing more directly on the second contention of the Board, also supplies compelling support for the position that the Board is not to be excluded from the prohibition of section 2283. This will be noted in the discussion of the preemption issue raised by the Board.

The Board next argues that the area covered by the state court injunction is within the exclusive jurisdiction of the N.L.R.B. and thus section 2283 does not apply. We feel that this argument is met squarely by the Supreme Court's findings in *Amalgamated Clothing Workers, supra*.

"In the face of this carefully considered enactment [§ 2283], we cannot accept the argument of the petitioner and the Board, as *amicus curiae*, that § 2283 does

not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defened exceptions.

"We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartly Act is self-determining or even easy. As we have noted in the *Weber* case, 'the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.' 348 U.S. at 480. What is within exclusive federal authority may first have to be determined by this Court to be so." *Amalgamated Clothing Workers, supra*, at 515-16.

Thus, while we note, although not deciding, that the complained of picketing in the instant case may be within the exclusive jurisdiction of the N.L.R.B. by virtue of the *San Diego Building Trades Council* case, this without more does not remove the limitation on this Court's power to grant the injunctive relief requested.

This would also reenforce our determination that the Board should not be considered as having the Government's immunity to section 2283. If this Court may not exercise its equity power to ban state courts from federally preempted areas, then there is no logic to the argument that the Board as administrator of the preempted areas and being vested with exclusive jurisdiction therein, should enjoy the exclusion from the operation of section 2283 when it seeks to protect this jurisdiction. Section 2283 provides that the Board will be exempt when the Court is "authorized by an act of Congress" to issue injunctive relief. The National Labor Relations Act in 29 U.S.C.A. 160 §§ (j) and (l) provides a remedy to the Board to protect this jurisdiction.

Thus, it is our conclusion that unless the Board can bring itself within one of the exceptions to section 2283, this Court is powerless to act in the case before us.

Preliminary to a discussion of this Court's authority to grant relief requested under section 10 (j) or 10 (l) of the Act, it is necessary to set forth the chronology of events leading up to the instant case.

An unfair labor charge was filed by the Union with the Board on October 9, 1968 alleging unfair labor practices on the part of the company. A complaint was issued on January 7, 1969 and a hearing was held thereon on February 11 and 12, 1969. The Trial Examiner's Decision and Recommended Order was issued April 28, 1969.

The trial Examiner found that the Company was engaged in unfair labor practices in that it refused to bargain with the Union as the exclusive representative of the employees in the appropriate unit, suggested the substitution of non-Union representation for Union representation, by soliciting revocation of prior Union authorizations, and by advising employees not to attend Union meetings and by coercively interrogating employees not to attend Union meetings and by coercively interrogating employees concerning Union representation (Exhibit B, filing #1). No mention of picketing is found in the Trial Examiner's Decision or Recommended Order. After the issuance of the Decision, the Company took exception to the findings and the case is currently pending before the Board.¹

Approximately one-month after the issuance of the Trial Examiner's Decision, the Union commenced picketing the Jack & Jill Store in Grand Island, Nebraska.

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for injunctive relief against the picketing. The court granted the requested relief on June 25, 1969 and issued a temporary injunction.

It will be noted that no charges concerning the picketing have been filed by the Company or the Union with the N.L.R.B. The Board has made no examination of the picketing either with regard to Union or Company activity. Section 10 (j) of the Act reads:

¹ On September 21, 1969 an article appeared in the Lincoln Evening Journal indicating that the National Labor Relations Board had found for the Nash-Finch Company, thus rejecting the findings of the Trial Examiner.

“The Board shall have the power, upon the issuance of a complaint as provided in sub-section (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order.” 29 U.S.C.A. § 160 (j)

Thus it would appear that for this Court to entertain a request for relief in a 10 (j) proceeding, there must exist, as a prerequisite to the Board's application, a complaint which has as its basis the activities in question. *National Labor Relations Board v. Swift & Company*, 233 F. 2d 226 (8th Cir. 1956). As has been noted, the picketing in question here has not been the basis for the issuance of such a complaint. This being the case, it is the conclusion of this court that under the circumstances, section 10 (j) does not authorize us to avoid the prohibitions of section 2283. We note that we do not determine that section 10 (j) would allow this Court to exercise its jurisdiction should all proper prerequisites be met, leaving this question for future determination.

The question next arises as to whether section 10 (l) affords a proper basis upon which to issue the relief requested. In this regard, the Board relies upon *Capital Service Inc. v. N.L.R.B.*, 347 U.S. 501 (1954). In this case, the manufacturer filed an unfair labor practice charge against the union concerning picketing activities. He also filed suit in a California state court for injunctive relief. The Board issued an unfair labor practice complaint against the union on a limited basis and instituted a 10 (l) proceeding in the United States District Court for an injunction restraining certain activities occurring during the course of picketing. Approximately one month prior to this, the California state court had issued the requested relief. In the 10 (l) proceeding, the Board asked that injunctive relief issue against the state court injunction; the United States Supreme Court held that as the state court injunction and the properly requested injunctive relief from the District Court touched the same basic activity, the District Court had properly restrained the state court injunction within

the meaning of the "in aid of its jurisdiction" exception to section 2283.

Thus, if we were, in the instant case, faced with an application by the Board for an injunction to restrain activities upon which a complaint had been issued, and were also confronted with a state court injunction which would interfere with the exercise of this Court's jurisdiction over the subject matter, we would be bound under the *Capital Service* case and the policies of the N.L.R.A. to restrain the enforcement of the state court decree. This is not the case here, however. The picketing in question is not involved in the complaint issued by the Board on January 7, 1969. If and when this complaint reduces itself to final adjudication by the Board and the Board applies to this Court for appropriate relief in a 10 (1) proceeding, the activities of the Company and those of the Union picketing are sufficiently separate to allow this Court to draft a decree against the Company without involving the picketing activities. See *N.L.R.B. v. Swift & Co. supra*.

It is the conclusion of this Court that it does not have the power by virtue of the limitations imposed upon it by section 2283 to issue the requested relief.

It may be pointed out that such a holding leads to the rather anomalous result. It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is particularly relevant here where picketing activities are involved and, as noted earlier in this opinion, Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

The United States Supreme Court in *Amalgamated Clothing Workers, supra*, at 520, poses a question which is yet to be answered and upon its determination, may provide a remedy for situations such as the Board and Union are faced with in the instant case. Mr. Justice Frankfurter notes that it has not yet been decided whether a company's application to a state court for an injunction covering

federally preempted employee rights under § 7 and § 8 (a)(1) of the Act, may, in itself, constitute an unfair labor practice. See Footnote 6, at 520. Thus, if this were so, the Union could file an unfair labor charge with the Board upon which a complaint could issue and, at that time, the Board could invoke the injunctive power of the Court under section 10 (j) or 10 (l).

Our decision today does not cut off the Union or the Board from their rights of appellate review in both state and federal courts. Rather, we conclude that, under the factual situation found here, Congress has precluded this court from acting, seeking instead to maintain the traditional dichotomy of the federal and the state courts. We assume, as it proper, that federally protected rights will be vindicated in state courts to the same extent that they would find vindication in the federal courts.

In view of the above,

IT IS ORDERED that the motion of the National Labor Relations Board for a preliminary injunction, being filing #2, should be and hereby is overruled and denied.

In view of our disposition of the case, we do not feel it necessary to determine on the merits the motion of the Union to intervene in this action. It will be noted that counsel for the Union appeared and was heard on matters touching all three motions at the September 12th hearing.

IT IS THEREFORE FURTHER ORDERED that the motion of the Union to intervene, being filing #3, should be and hereby is overruled and denied.

Finally, as it is this Court's determination that we are without jurisdiction to grant the relief requested,

IT IS THEREFORE FURTHER ORDERED that the motion of the defendant Nash Finch to dismiss, being filing #6, should be and hereby is sustained and the complaint is dismissed.

Dated: September 26, 1969.

BY THE COURT

/S/

Robert Van Pelt
Judge, U. S. District Court

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that the National Labor Relations Board, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying the motion of the National Labor Relations Board for a preliminary injunction and granting Defendant's motion to dismiss entered in this action on the 26th day of September, 1969.

Dated at Wash- ington, D. C. this 9th day of Octo- ber, 1969.	/s/ Marcel Mallet-Prevost (J. T.) Marcel Mallet-Prevost <i>Assistant General Counsel</i> National Labor Relations Board
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[Caption Omitted in Printing]

NOTICE OF APPEAL

[filed Oct. 21, 1969, Richard P. Peck, Clerk]

Notice is hereby given that Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, District Union 271, proposed intervenor plaintiff herein, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying the Union's motion to intervene entered in this action on September 26, 1969.

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/s/ Solomon I. Hirsh
SOLOMON I. HIRSH
Counsel for the Union

/s/ David D. Weinberg
DAVID D. WEINBERG
Counsel for the Union

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,983

NATIONAL LABOR RELATIONS BOARD,
Appellant,

vs.

NASH-FINCH COMPANY, d/b/a JACK
AND JILL STORES, *Appellee.*
and

No. 19,993

NATIONAL LABOR RELATIONS BOARD,
vs.

NASH-FINCH COMPANY, D/B/A JACK
AND JILL STORES, a Delaware Cor-
poration Authorized to Do Busi-
ness in the State of Nebraska,
Appellee,

vs.

AMALGAMATED MEAT CUTTERS &
BUTCHER WORKMEN OF NORTH
AMERICA, AFL-CIO, DISTRICT
UNION 271, *Appellant.*

Appeals from the
United States Dis-
trict Court for the
District of Ne-
braska.

[December 2, 1970.]

Before GIBSON and LAY, Circuit Judges and HUNTER,
District Judge.

HUNTER, District Judge.

This case is before us on appeal from an order of the
United States District Court for the District of Nebraska
dismissing an action for injunctive relief instituted by the
National Labor Relations Board against Nash-Finch Com-

pany, d/b/a Jack & Jill Stores. The Board's complaint, brought pursuant to 28 U.S.C. Section 1337,¹ sought to restrain the Company from proceeding under or from enforcing an injunction issued by the District Court of Hall County, Nebraska, against Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, District Union 271 and persons in active concert and participation with it, on the grounds that such injunction regulated conduct preempted by the National Labor Relations Act and interfered with the Board's exclusive jurisdiction over the subject. The Union by motion unsuccessfully endeavored to intervene as a party plaintiff in the action, and also has appealed.

The District Court in a carefully considered unpublished opinion ruled against both the Board and the Union. Upon consideration of the various issues presented on appeal, we affirm.

Background

In August, 1968, the Union began an organizing campaign among the meat department employees of the Jack & Jill stores in Grand Island, Nebraska. The Union demanded recognition based on signed authorization cards, and the Company expressed what it termed a good faith doubt of the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board for an election.

On October 9, 1968, the Union filed unfair labor practices against the Company alleging violations of Section 8(a) (1) and (5) of the Labor Management Relations Act. The Board's Regional Director investigated the charges regarding certain Company conduct at its Grand Island and Hastings, Nebraska stores and on January 7, 1969, issued an unfair labor practice complaint concerning the Company's refusal to bargain with the Union and miscellaneous unfair labor practices involving interrogation and solicitation by the Company of its employees regarding the Union. The Company denied the alleged unfair labor practices.

¹ 28 U.S.C. §1337 gives a District Court jurisdiction of questions arising under an Act of Congress; see, *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954); *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511.

Following the statutory hearing, the trial examiner on April 28, 1969, found that the Company had violated Section 8(a) (1) and (5) of the Act by refusing to bargain with the Union as the exclusive representative of its employees in an appropriate unit, by suggesting the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation. The trial examiner recommended inter alia, that the Company cease and desist from soliciting employee revocation of Union designation cards, suggesting the substitution of non-Union representation, advising employees not to attend Union meetings, coercively interrogating employees concerning Union representation and in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under the Act. The trial examiner also recommended that the complaint be dismissed as to allegations of unfair labor practices not specifically found to have been engaged in. The Company filed exceptions to the recommended decision.

Approximately one month after the issuance of the trial examiner's recommended decision, and before the Board's decision, the Union began picketing the Company's Grand Island, Nebraska stores with signs advising the public that the Union was striking in protest of the Company's unfair labor practices. The Union also distributed handbills stating the Company refused to bargain or comply with other findings or recommendations of a trial examiner of the National Labor Relations Board and urged the public not to shop at the Company's stores.

On September 17, 1969, the Board reversed the trial examiner's decision and concluded that the Company had not violated Sections 8(a) (1) and (5) of the Act by refusing to bargain with the Union, and that the Union had not represented a valid majority of the Company's employees when the bargaining demand was made. The Board concluded the Company had violated Section 8(a) (1) by its other actions and it entered a cease and desist order in that regard.

On May 27, 1969, the Company filed a petition for injunctive relief in the District Court of Hall County, Nebraska

against the Union, its officers and certain individual pickets, alleging that the Union's picketing as engaged in included threatening and intimidating customers, stopped, blocked, and prevented free ingress and egress of the public to and from the picketed premises and constituted mass picketing, in violation of Section 28—814.02 of the Nebraska Revised Statutes. Shortly thereafter the state court issued its injunction which limited the Union's picketing in certain respects.²

On August 27, 1969, the Board filed a complaint in the Federal District Court of Nebraska against the Company, seeking to restrain the Company from enforcing or attempting to enforce those parts of the state court temporary injunction alleged to violate Article VI, Clause 2 (The Supremacy Clause) of the Constitution of the United States because it conflicted with the National Labor Relations Act, and other parts of the injunction claimed to restrain peaceful picketing³ and to be within the area arguably preempted by the National Labor Relations Act.

Upon motion by the Company, the federal district court dismissed the complaint, relying on 28 U.S.C. Section 2283 which provides, "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." It also dismissed the Union's motion to intervene as a party plaintiff.

First Contention

On this appeal the Board contends that the National Labor Relations Board is the United States for the purpose

² The Union was limited, inter alia, to two pickets at each store; enjoined from distributing certain handbills, from blocking entrances or exits to the store, from conversing with the store's customers and from picketing in violation of the mentioned Nebraska statutes.

³ No record testimony was taken in the district court regarding the factual situations surrounding the picketing. Appellant denies that only peaceful picketing occurred, stating in its brief that there were blocked entrances, nails in parking lots, property damage and a series of bomb threats. Because of our finding that the federal district court was without authority to enjoin the state court proceeding, we do not reach the question of whether the state court had power or jurisdiction to issue the order restraining the primary picketing. See, *Atlantic Coast Line R. Co. v. Engineers*, . . . U.S. . . . (1970).

of 18 U.S.C. Section 2283, and therefore that provision is not a bar to the issuance of a federal district court injunction. It cites and relies on *Leiter Minerals v. United States*, 352 U.S. 220 (1957).

We recognize that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings. *Leiter Minerals v. United States*, *supra*; *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961); *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2nd Cir. 1966); *Baines v. City of Damville*, 337 F.2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939; *Brown v. Wright*, 137 F.2d 484 (4th Cir. 1943); *U.S. v. Farmers State Bank*, 249 F. Supp. 579 (D. S.D. 1966); *Sobel v. Perez*, 289 F. Supp. 392 (E.D. La. 1968). However, the Board's contention and rationale that it is to be treated as the United States since it is an agency of the United States, and therefore that Section 2283 does not bar the issuance of an injunction has been unsuccessfully asserted by it over the years, and has been firmly rejected by this court in *N.L.R.B. v. Swift & Co.*, 233 F.2d 226 (8th Cir. 1956). We quote from that decision, *loc. cit.* 232:

"The Board, citing *United States v. United Mine Workers of America*, 330 U.S. 258, 272, 67 S. Ct. 677, 91 L. Ed. 884, asserts that statutes which in general terms divest previously-existing rights will not be applied to the sovereign without express words to that effect, and then contends that as an agency of the United States it must be considered in the same light as the United States for the purpose of the construction of the applicability of section 2283. The authorities cited by the Board do not support its contention that it has acquired all the privileges and immunities of the United States. For example, we think *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 73 S.Ct. 80, 97 L.Ed. 23, cited by the Board, negatives the Board's contention. It was there held that a debt owed the Board was not entitled to preference as a debt owed the United States. The intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 311 U.S. 81, 61 S.Ct. 485, 85 L.Ed. 595."

* * *

"The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283."

Thus, in *Swift* and in other decisions it is established that the intention of Congress to bestow the privileges and immunities of the United States upon agencies created by the United States must be clearly demonstrated. As in *Swift*, there is no demonstration here that Congress intended to exempt actions brought by the National Labor Relations Board from the limitation imposed by Section 2283, and we are not justified in extending the exemption doctrine applicable to the United States to that Board. As stated by the Supreme Court in *Amalgamated Clothing Workers, supra*, 514: "By that enactment [Section 2283], Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."⁴ Many of the problems of state-federal relationship which Congress sought to avoid by enacting Section 2283 would not be avoided if by judicial improvisation we extended the doctrine of the *Leiter* case to include federal agencies not specifically granted the cloak of sovereignty by statute. The *Leiter* case, *supra*, involved the United States itself and not an agency of the United States.

We again hold that for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States. We further hold that Section 2283 is applicable to the National Labor Relations Board as a party seeking to enjoin a state court injunction or state court proceedings.

Second Contention

The Board next contends that the area covered by the state court injunction has been preempted by Congress, and is within the exclusive jurisdiction of the National Labor Relations Board. Therefore, the Board asserts, Section 2283 does not apply as the state court is wholly without jurisdiction over the subject matter.

This contention of a general federal preemption of picketing so as to preclude applicability of Section 2283 previously

⁴ To the same effect, see, *Norwood v. Parenteau*, 228 F.2d 148 (8th Cir. 1955), cert. den. 351 U.S. 955 (1954).

has been unsuccessfully urged by the Board, and others, in other cases. In *Swift, supra*, loc. cit. 230, this court ruled the contention against the Board, citing and quoting from *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 515-516. There, speaking for the Supreme Court Mr. Justice Frankfurter stated: "In the face of this carefully considered enactment, [Section 2283] we cannot accept the argument of petitioner and the Board, as *amicus curiae*, that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

We further declared in *Swift*, loc. cit. 516, that: "The [Supreme] Court, 348 U.S. at page 518, 75 S. Ct. at page 457 also fully answers the contention made in our present case, that if a State action is not halted the Federal labor relations plan will be disrupted, by stating that the State courts have for many years adequately protected Federal rights, and that. 'The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.'"⁵

Even more directly to the point, is the recent case of *Atlantic Coast Line R. Co. v. Engineers*, . . . U.S. . . . (1970), in which a federal district court enjoined a railroad from invoking an injunction issued by a Florida state court prohibiting certain picketing by the Union.⁶ Speaking

⁵ The anti-injunction statute has been on the books in some form since 1793. See, Act of March 2, 1793, Ch. 22, #5, 1 Stat. 335., Durfee & Sloss, *Federal Injunction against Proceedings in State Courts: The Life History of a Statute*, 30 Mich. L. Rev. 1145 (1932).

⁶ *Atlantic Coast Line R. Co. v. Brotherhood of Engineers*, . . . U.S. . . . (1970), held that the prohibition in 28 U.S.C. § 2283 can not be evaded by addressing an order to the parties or by prohibiting utilization of the results of a completed state court proceeding. See, also, *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1960); *Hill v. Martin*, 296 U.S. 393 (1935).

through Mr. Justice Black, the Supreme Court reversed and declared: "First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers v. Richman Bros.*, supra, at 519-520, 99 L. Ed. at 609-610, 75 S.Ct. 452. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be 'necessary in aid of' that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."

* * *

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

We conclude there has not been any general preemption of the field so as to deprive the state court of jurisdiction over the subject matter and to cause Section 2283 to be inapplicable in a federal court proceeding to enjoin enforcement of a state court injunction.

Third Contention

The Board further contends that if Section 2283 is applicable, the questioned activities are within the ambit of

Sections 10(j) and 10(l) of the National Labor Relations Act and therefore within the "as authorized by an Act of Congress" or "in aid of its jurisdiction" exceptions to Section 2283. However, the Board has not issued a complaint in the instant case which will allow it to seek an injunction under the terms of 10(j) or 10(l) of the National Labor Relations Act.⁷ The picketing in this case which has been enjoined by the state court has never been made the subject of an unfair labor practice charge or complaint.⁸ The state court injunction does not concern itself with a refusal to bargain, interrogation of employees or solicitation of employees to withdraw from the Union or with any other matter before the Board in its unfair labor practice complaint of January 7, 1968.

Thus, the Board is not in a sound position on the record before us to successfully contend the requested federal injunction falls within the statutory exceptions "as authorized by an Act of Congress" or the "in aid of its jurisdiction," and in the light of the teachings in *Atlantic Coast Line R. Co. and Amalgamated Clothing Workers of America, supra*, we find no merit in the Board's contention in that regard.

The Board cites *Capital Service Inc. v. N.L.R.B.*, 347 U.S. 501 (1954). There, the Company had filed suit in the state court for an injunction against the Union and had also filed with the Board a charge of unfair labor practice against the Union. Each had as a basis the same conduct of the Union. The state court enjoined all picketing of retail stores. The Regional Director issued an unfair labor practice complaint of a limited nature and petitioned the federal district court for an injunction restraining such conduct of the Union pending final adjudication by the Board, as required by Section 10(l) of the Act. Simultaneously with the filing of the Section 10(l) petition, the Board filed suit in the same court asking that petitioner be enjoined from enforcing the state court injunction. The district court granted a preliminary injunction restraining the employer from enforcing the state court injunction. The Supreme Court affirmed, holding that the injunction issued by the District

⁷ 29 U.S.C. § 160 (j) and (l).

⁸ The federal trial court found "the picketing in question is not involved in the complaint issued by the Board on January 7, 1969."

court was "necessary in aid of its jurisdiction" and thus permitted under the exceptions specifically allowed by Congress. However, *Capital Service, Inc.*, is clearly inapplicable here, for as earlier noted, there has not been any application by the Board for an injunction to restrain activities upon which a complaint has been issued by it. Nor are we confronted in the instant case with the same basic activity as that which the state court had before it, for 10(j) and (l) has not been followed so as to present any picketing issue to the federal court.

Thus, we have concluded the federal district court correctly decided that in view of the limitations placed on it by 28 U.S.C. Section 2283 it did not have power to issue the relief requested by the Board.

Motion to Intervene

We also accord with the district court's denial of the motion of the Union to intervene entered after the trial court had determined it did not have power to grant the relief requested by the Board and dismissed the Board's complaint. Since the plaintiff—the Board—had not brought its action within any of the exceptions to Section 2283, no proper purpose would be served by permitting the requested intervention. *Collins v. Laclede Gas Co.*, 237 F.2d 633, (8 Cir. 1956); *Rosso v. Commonwealth of Puerto Rico*, 226 F.Supp. 688 (D. P.R. 1964).

In accordance with the reasons given above, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

JUDGMENT

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

[filed Jan. 6, 1971, Richard P. Peck, Clerk]

Nos. 19983-19993.

September Term, 1970

No. 19983

National Labor Relations Board, Appellant, v. Nash-Finch Company, d/b/a Jack & Jill Stores, a Delaware Corporation authorized to do business in the State of Nebraska, Appellee.

No. 19993.

National Labor Relations Board, vs. Nash-Finch Company, d/b/a Jack & Jill Stores, a Delaware Corporation authorized to do business in the State of Nebraska, Appellee.

Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, District Union 271, Appellant.

APPEAL FROM the United States District Court for the District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Nebraska and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 2, 1970

Costs taxed in favor of
the appellee:

Printing 25 copies of
brief of appellee in

Nos. 19983 and 19993 \$130.19

Total costs of appellee \$130.19,

for recovery from appellants in
the U.S. District Court.

A true copy.

Attest:

/s/ Illegible
Clerk,

U.S. Court of Appeals,
Eighth Circuit.
December 31, 1970.

SUPREME COURT OF THE UNITED STATES

No. 1420, October Term, 1970

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NASH-FINCH COMPANY, dba JACK AND JILL STORES
ORDER ALLOWING CERTIORARI. Filed April 26, 1971.
The petition herein for a writ of certiorari to the United
States Court of Appeals for the Eighth Circuit is granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

NASH-FINCH COMPANY, D/B/A
JACK AND JILL STORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15-27) is not yet officially reported. The memorandum and order of the district court (App. B, *infra*, pp. 30-40) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1970 (App. A, *infra*, pp. 28-29). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an agency of the United States is within the governmental exception to the statute which ordinarily prohibits federal courts from enjoining state court proceedings, 28 U.S.C. 2283, so that the National Labor Relations Board may, through proceedings in a federal court, enjoin the implementation of a state court order which regulates peaceful picketing governed exclusively by the National Labor Relations Act.

STATUTES INVOLVED

28 U.S.C. 2283 provides as follows:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Also relevant are portions of the Nebraska anti-picketing statute, which are set out at App. D, *infra*, pp. 43-44.

STATEMENT

A. THE UNDERLYING FACTS

In August 1968, District Union 271, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, began an organizing campaign among the meat department employees of the Jack and Jill ("Company") stores in Grand Island, Nebraska (App. A, *infra*, p. 16; A. 11).¹ In October 1968, the Union

¹ "A." refers to the portion of the record printed as an appendix to the briefs in the court of appeals.

filed unfair labor practice charges against the Company alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. 158 (a)(1) and (5)); a complaint was issued (App. A, *infra*, p. 17; A. 10). In April 1969, after hearing, the Trial Examiner sustained the complaint, finding that the Company had violated those provisions of the Act by refusing to bargain with the Union, and by suggesting "the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation" (App. A, *infra*, p. 17; A. 26-27). The Trial Examiner recommended that the Company be ordered to cease and desist from the unfair labor practices found and from any like or related conduct, and to bargain with the Union (App. A, *infra*, pp. 17-18; A. 27).

Approximately one month after issuance of the Trial Examiner's decision, the Union began picketing the Company's stores with signs advising the public that the Union was striking in protest against the Company's unfair labor practices (App. A, *infra*, p. 18; A. 30, 31). The Union also distributed handbills to passers-by which stated, in part, that the Company refused to bargain "or comply with other findings and recommendations of a trial examiner of the National Labor Relations Board," and urged members of the public not to shop at the Company's stores (App. A, *infra*, p. 18; A. 34).

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for an injunction against the Union, its officers, and certain individual pickets (App. A, *infra*, p. 18; A. 30-34). The petition alleged that the Union was engaging in "mass picketing" in violation of Nebraska law, by picketing with more than two pickets within 50 feet of each other and by blocking entry to and exit from the stores; that, insofar as the signs and handbills represented that a strike existed and that the Company was engaged in unfair labor practice activity, they were false and malicious in further violation of state law; and that the pickets had threatened customers with property loss, had used profane and vulgar language, and had slandered the Company's business reputation (App. A, *infra*, p. 18; A. 31-32).

The state court issued a temporary restraining order, and then, overruling the Union's motion to vacate, a temporary injunction (App. A, *infra*, pp. 18-19; A. 35-36, 7-9). The injunction, which remains in effect, limits pickets to two at each of the Company's stores, and enjoins them from blocking or picketing entrances or exits to the store, and from distributing handbills or literature pertaining to the dispute in any manner which would halt or slow the movement of traffic (App. C, *infra*, p. 42; A. 8). The injunction also bars (1) anyone other than a bona fide member of the Union from picketing unless that person first submits himself to the jurisdiction of the state court by becoming a defendant in the proceedings; (2) pickets from instigating conversations with the Company's customers in any manner relating to the dispute; (3) pick-

ets from "[d]oing any act in violation of Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964";² and (4) anyone, other than pickets or named defendants, from picketing, handbilling, or otherwise "caus[ing] to be published or broadcast any information pertaining to the dispute * * * between the parties" (App. C, *infra*, p. 42; A. 8-9).

In September 1969, several months after this injunction was obtained, the Board announced its decision accepting in part and rejecting in part the Trial Examiner's recommendations.³

B. THE FEDERAL COURT PROCEEDINGS

On August 29, 1969, the Board filed suit in the federal district court in Nebraska for an injunction to restrain the Company from enforcing the provisions of the state court injunction described in (1) to (4), *supra*, on the ground that they regulated conduct which was governed exclusively by the National Labor Relations Act (App. A, *infra*, p. 19; A. 6, 37-38). The district court denied the Board's motion for a preliminary injunction and granted the Company's motion to dismiss the complaint (App. B, *infra*, pp. 30-40). Although noting that the Union's picketing "may be within the exclusive jurisdiction of the N.L.R.B.," it

² These provisions are discussed in n. 8, *infra*.

³ The Board sustained the Examiner's Section 8(a)(1) findings and his remedy therefor, but rejected his findings of an unlawful refusal to bargain and his recommended bargaining order. Respecting the latter, the Board found the Union's showing of majority status deficient. 178 NLRB No. 77, 72 LRRM 1144. The Company subsequently complied with the Board's decision.

concluded that it did not "have the power by virtue of the limitations imposed upon it by [28 U.S.C.] section 2283 to issue the [Board's] requested relief" (App. B, *infra*, pp. 34, 38). Section 2283, in general, prohibits federal courts from interfering with state court proceedings. The district court rejected the Board's contention that it was within the governmental exception to Section 2283 recognized in *Leiter Minerals v. United States*, 352 U.S. 220 (App. B, *infra*, pp. 32-33).

The Eighth Circuit affirmed (App. A, *infra*, pp. 15-27). Although recognizing "that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings," the court adhered to an earlier holding, *National Labor Relations Board v. Swift & Co.*, 233 F. 2d 226, 232, that, "for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States" (App. A, *infra*, pp. 20, 22). Since the Board could not avoid the prohibitions of Section 2283 on the basis of any of its other exceptions, an injunction against the state court proceeding was barred (App. A, *infra*, pp. 22-27).

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's holding is in conflict with the decision of the Fifth Circuit in *National Labor Relations Board v. Roywood Corp.*, 429 F. 2d 964, on the important question whether agencies of the United States such as the Board are within the implied governmental exception to 28 U.S.C. 2283, which ordi-

narly prohibits federal courts from interfering in state court proceedings.

The governmental exception is separate and apart from those specifically referred to in Section 2283, such as an injunction "to protect or effectuate [a federal court's] judgments," and only the governmental exception is possibly relevant here. It was articulated in a case brought in the name of the United States. *Leiter Minerals v. United States*, 352 U.S. 220. Since, like other federal agencies, the Board sues in its own name and not that of the United States, the Eighth Circuit concluded here that the Board is not the United States for purposes of the governmental exception to Section 2283. In *Roywood*, on the other hand, the Fifth Circuit held that a Board injunction action does fall within that exception:

When the Board * * * sues, it need not fit its case into one of the confining exceptions of section 2283, nor need it bear the heavy burden of showing its case "exceptional" in immediate impact between the parties to the dispute. It sues not as a private party but as an agency of the United States Government charged with administering the national labor laws * * *. [429 F. 2d at 970.]

The facts of *Roywood* are essentially similar to the facts of this case. The employer sought and obtained a state court injunction barring peaceful picketing on the ground that the pickets' signs and handbills contained libelous statements. The Board's Regional Director had previously determined that this activity did not warrant a complaint under the Act, and thus

was not contrary to an informal settlement agreement which he and the union had made following earlier picketing activity which he believed did violate the Act's secondary boycott provisions. Where the Eighth Circuit permitted the state court injunction to remain in force, the Fifth Circuit held that Section 2283 did not bar a Board suit to prevent enforcement of the state court injunction.

2. The question whether federal courts, at a federal agency's behest, may enjoin state court intrusions into an exclusively federal jurisdiction in cases in which the specific statutory exceptions of Section 2283 are not met is one which has not been, but should be, decided by this Court.

This question was left open in *Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501. There an employer obtained a state court injunction banning union picketing activity, and then filed an unfair labor practice charge with the Board respecting the same activity. The Board's Regional Director found that some of the activity violated the secondary boycott provisions of the National Labor Relations Act, but that the rest was permissible under the Act. He petitioned a federal district court under Section 10(1) of the Act (29 U.S.C. 160(1)) for an injunction restraining the union from engaging in the former conduct, and simultaneously asked the federal court to enjoin the employer from enforcing the state court injunction. This Court found Section 2283 was no bar to the Board's suit respecting the state court proceeding because the relief requested was "necessary in aid of [the district court's] jurisdiction." 347 U.S. at

505. Accordingly, the Court found it "unnecessary to consider whether, apart from the specific exceptions contained in § 2283, the District Court was justified in enjoining the intrusion on an exclusive federal jurisdiction." *Ibid.*, n. 2.

The holding below conflicts in principle with *Leiter Minerals, Inc. v. United States*, 352 U.S. 220. There, this Court held that Section 2283 did not bar a suit by the United States to enjoin a state court proceeding brought by a person seeking mineral rights in land owned by the United States, stating (*id.* at 225-226) :

The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties ['] which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests which would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. * * *

Although *Leiter* involved a suit by the United States itself rather than one of its agencies, the rationale of that decision is equally applicable to federal agencies

⁴ *E.g., Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511; *Atlantic Coast Line R. Co. v. Bro. of Locomotive Engineers*, 398 U.S. 281.

such as the Board. The Board has been accorded the same sovereign immunity enjoyed by the United States.⁵ Moreover, in bringing suit to enjoin the state court proceeding here, the Board is seeking to protect, not private interests, but the regulatory scheme of the National Labor Relations Act from state impairment. See *Garner v. Teamsters Union*, 346 U.S. 485, 490; cf. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265. And, since an injunction can have a significant impact in a labor dispute and to attempt to remove it through state appellate procedures requires considerable time, a "frustration of superior federal interests" (*Leiter, supra*, 352 U.S. at 226) would ensue if the federal court were not free to act at the suit of the Board.⁶

⁵ Thus, actions against the Board have been dismissed on the ground that the suit is against the United States which cannot be sued without the consent of Congress. *Clover Fork Coal Co. v. National Labor Relations Board*, 107 F. 2d 1009 (C.A. 6); *Biggs v. National Labor Relations Board*, 38 LRRM 2728 (N.D. Ill.). Accord: *Blackmar v. Guerre*, 342 U.S. 512, 515 (suit against War Assets Administration); *Simons v. Vinson*, 394 F. 2d 732, 736 (C.A. 5) (suit against Department of Interior and Bureaus of Land Management and Indian affairs); *Cotter Corp. v. Seaborg*, 370 F. 2d 686, 691-692 (C.A. 10) (suit against Atomic Energy Commission).

See also *Gala-Mo Arts, Inc. v. Laiben*, 37 LRRM 2134 (E.D. Mo.) (Board Regional Director entitled to governmental immunity against suits for damages for acts performed in the course of official duties).

⁶ The district court recognized that its holding could have this result (App. B, *infra*, p. 38):

It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is par-

Nathanson v. National Labor Relations Board, 344 U.S. 25, relied upon by the Eighth Circuit in *Swift*, *supra*, 233 F. 2d at 232, does not require a contrary conclusion. In *Nathanson*, this Court held that, when the Board seeks to collect back pay due an employee from a bankrupt employer, it does not stand in the same position as the United States for purposes of determining priority of claims under the Bankruptcy Act; for, in a bankruptcy proceeding, the Board is asserting primarily the employee's private, rather than the national, interest. But in this case the Board is not asserting a private interest; it seeks to protect the regulatory scheme established by the National Labor Relations Act.⁷

This Court's very recent decisions in *Younger v. Harris*, No. 2, this Term, decided February 23, 1971, and associated cases, speak to an entirely different problem and to private plaintiffs, and so are not controlling here.

3. The question whether Section 2283 is applicable to suits brought by federal agencies to enjoin state court proceedings which impinge upon a field preempted by federal law, here the National Labor Re-

ticularly relevant here where picketing activities are involved and * * * Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

⁷ *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U.S. 81, also relied on by the Eighth Circuit in *Swift*, is fully consistent with this analysis, for it, too, involved no issues of national policy.

lations Act, is of manifest administrative importance. In the particular context of the Labor Board, the question has a significant bearing on the relation between federal and state courts in labor disputes affecting interstate commerce. A prompt resolution of the issue by this Court is thus warranted.

⁸ The state's right to enjoin mass or violent picketing does not justify a ban on all picketing or other forms of peaceful concerted activity. See *Youngdahl v. Rainfair*, 355 U.S. 131, 139-140; *United Mine Workers v. Gibbs*, 383 U.S. 715, 729-735. Portions of the injunction here limit the picketing to bona-fide members of the Union, and then only to those who submit themselves to the jurisdiction of the state court; prohibit the pickets from "[i]nstigating conversations with [the Company's] customers in any matter relating to the dispute herein"; and bar persons other than qualifying pickets from causing "to be published or broadcast any information pertaining to the dispute between the parties hereto" (*supra*, pp. 4-5). These provisions excessively restrict the exercise of peaceful concerted activity, and thus conflict with the National Labor Relations Act. See *Hill v. Florida*, 325 U.S. 538; *Tyree v. Edwards*, 287 F. Supp. 589 (D. Alaska), affirmed, *sub nom.*, *Alaska v. Int'l. Union of Operating Engineers*, 393 U.S. 405; *Garner v. Teamsters Union*, 346 U.S. 485, 499-500; *National Labor Relations Board v. Servette*, 377 U.S. 46; *National Labor Relations Board v. Fruit & Vegetable Packers*, 377 U.S. 58; *Bro. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385. Moreover, the state injunction also enjoins the pickets from "[d]oing any act in violation of Sections 28-812, 28-814.01 and 28.814.02 R.S. Neb. 1964" (*supra*, p. 5). These provisions (App. D, *infra*, pp. 43-44) not only ban mass picketing and acts of physical coercion against persons desiring to work, but also "loitering about, picketing or patrolling the place of work * * * of such person * * * against the will of such person." Given such excessive breadth, they tend to chill the exercise of purely peaceful picketing. See *Thornhill v. Alabama*, 310 U.S. 88, 99-101, 104-105.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
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Attorney,
National Labor Relations Board.

MARCH 1971.

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 19,983

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES,
APPELLEE

and

No. 19,993

NATIONAL LABOR RELATIONS BOARD,

v.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES,
A DELAWARE CORPORATION AUTHORIZED TO DO BUSI-
NESS IN THE STATE OF NEBRASKA, APPELLEE,

v.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, DISTRICT UNION 271,
APPELLANT

[December 2, 1970.]

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA*

(15)

Before GIBSON and LAY, Circuit Judges and HUNTER, District Judge.

HUNTER, *District Judge*: This case is before us on appeal from an order of the United States District Court for the District of Nebraska dismissing an action for injunctive relief instituted by the National Labor Relations Board against Nash-Finch Company, d/b/a Jack & Jill Stores. The Board's complaint, brought pursuant to 28 U.S.C. Section 1337,¹ sought to restrain the Company from proceeding under or from enforcing an injunction issued by the District Court of Hall County, Nebraska, against Amalgamated Meat Cutter and Butcher Workmen of North American, AFL-CIO, District Union 271 and persons in active concert and participation with it, on the grounds that such injunction regulated conduct preempted by the National Labor Relations Act and interfered with the Board's exclusive jurisdiction over the subject. The Union by motion unsuccessfully endeavored to intervene as a party plaintiff in the action, and also has appealed.

The District Court in a carefully considered unpublished opinion ruled against both the Board and the Union. Upon consideration of the various issues presented on appeal, we affirm.

BACKGROUND

In August, 1968, the Union began an organizing campaign among the meat department employees of the Jack & Jill stores in Grand Island, Nebraska. The Union demanded recognition based on signed author-

¹ 28 U.S.C. § 1337 gives a District Court jurisdiction of questions arising under an Act of Congress; see, *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954); *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511.

ization cards, and the Company expressed what it termed a good faith doubt of the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board for an election.

On October 9, 1968, the Union filed unfair labor practices against the Company alleging violations of Section 8(a) (1) and (5) of the Labor Management Relations Act. The Board's Regional Director investigated the charges regarding certain Company conduct at its Grand Island and Hastings, Nebraska stores and on January 7, 1969, issued an unfair labor practice complaint concerning the Company's refusal to bargain with the Union and miscellaneous unfair labor practices involving interrogation and solicitation by the Company of its employees regarding the Union. The Company denied the alleged unfair labor practices.

Following the statutory hearing, the trial examiner on April 28, 1969, found that the Company had violated Section 8(a) (1) and (5) of the Act by refusing to bargain with the Union as the exclusive representative of its employees in an appropriate unit, by suggesting the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation. The trial examiner recommended inter alia, that the Company cease and desist from soliciting employee revocation of Union designation cards, suggesting the substitution of non-Union representation, advising employees not to attend Union meetings, coercively interrogating employees concerning Union representation and in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights

under the Act. The trial examiner also recommended that the complaint be dismissed as to allegations of unfair labor practices not specifically found to have been engaged in. The Company filed exceptions to the recommended decision.

Approximately one month after the issuance of the trial examiner's recommended decision, and before the Board's decision, the Union began picketing the Company's Grand Island, Nebraska stores with signs advising the public that the Union was striking in protest of the Company's unfair labor practices. The Union also distributed handbills stating the Company refused to bargain or comply with other findings or recommendations of a trial examiner of the National Labor Relations Board and urged the public not to shop at the Company's stores.

On September 17, 1969, the Board reversed the trial examiner's decision and concluded that the Company had not violated Sections 8(a) (1) and (5) of the Act by refusing to bargain with the Union, and that the Union had not represented a valid majority of the Company's employees when the bargaining demand was made. The Board concluded the Company had violated Section 8(a)(1) by its other actions and it entered a cease and desist order in that regard.

On May 27, 1969, the Company filed a petition for injunctive relief in the District Court of Hall County, Nebraska against the Union, its officers and certain individual pickets, alleging that the Union's picketing as engaged in included threatening and intimidating customers, stopped, blocked, and prevented free ingress and egress of the public to and from the picketed premises and constituted mass picketing, in violation of Section 28—814.02 of the Nebraska Revised Statutes. Shortly thereafter the state court issued its in-

junction which limited the Union's picketing in certain respects.²

On August 27, 1969, the Board filed a complaint in the Federal District Court of Nebraska against the Company, seeking to restrain the Company from enforcing or attempting to enforce those parts of the state court temporary injunction alleged to violate Article VI, Clause 2 (The Supremacy Clause) of the Constitution of the United States because it conflicted with the National Labor Relations Act, and other parts of the injunction claimed to restrain peaceful picketing³ and to be within the area arguably preempted by the National Labor Relations Act.

Upon motion by the Company, the federal district court dismissed the complaint, relying on 28 U.S.C. Section 2283 which provides, "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." It also dismissed the Union's motion to intervene as a party plaintiff.

² The Union was limited, inter alia, to two pickets at each store; enjoined from distributing certain handbills, from blocking entrances or exits to the store, from conversing with the store's customers and from picketing in violation of the mentioned Nebraska statutes.

³ No record testimony was taken in the district court regarding the factual situations surrounding the picketing. Appellant denies that only peaceful picketing occurred, stating in its brief that there were blocked entrances, nails in parking lots, property damage and a series of bomb threats. Because of our finding that the federal district court was without authority to enjoin the state court proceeding, we do not reach the question of whether the state court had power or jurisdiction to issue the order restraining the primary picketing. See, *Atlantic Coast Line R. Co. v. Engineers*, . . . U.S. . . . (1970).

FIRST CONTENTION

On this appeal the Board contends that the National Labor Relations Board is the United States for the purpose of 18 U.S.C. Section 2283, and therefore that provision is not a bar to the issuance of a federal district court injunction. It cites and relies on *Leiter Minerals v. United States*, 352 U.S. 220 (1957).

We recognize that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings. *Leiter Minerals v. United States*, *supra*; *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir. 1969); *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961); *Studebaker Corp. v. Gittlin*, 360 F.2d 692 (2nd Cir. 1966); *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939; *Brown v. Wright*, 137 F.2d 484 (4th Cir. 1943); *U.S. v. Farmers State Bank*, 249 F. Supp. 579 (D. S.D. 1966); *Sobel v. Perez*, 289 F.Supp. 392 (E.D. La. 1968). However, the Board's contention and rationale that it is to be treated as the United States since it is an agency of the United States, and, therefore that Section 2283 does not bar the issuance of an injunction has been unsuccessfully asserted by it over the years, and has been firmly rejected by this court in *N.L.R.B. v. Swift & Co.*, 233 F.2d 226 (8th Cir. 1956). We quote from that decision, *loc. cit.* 232:

"The Board, citing *United States v. United Mine Workers of America*, 330 U.S. 258, 272, 67 S. Ct. 677, 91 L. Ed. 884, asserts that statutes which in general terms divest previously-existing rights will not be applied to the sovereign without express words to that effect, and then contends that as an agency of the United States it must be considered in the same light as the United States for the purpose of the construc-

tion of the applicability of section 2283. The authorities cited by the Board do not support its contention that it has acquired all the privileges and immunities of the United States. For example, we think *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23, cited by the Board, negatives the Board's contention. It was there held that a debt owed the Board was not entitled to preference as a debt owed the United States. The intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Reconstruction Finance Corporation v. J. G. Menihan Corp.*, 311 U.S. 81, 61 S. Ct. 485, 85 L. Ed. 595."

* * * * *

"The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283."

Thus, in *Swift* and in other decisions it is established that the intention of Congress to bestow the privileges and immunities of the United States upon agencies created by the United States must be clearly demonstrated. As in *Swift*, there is no demonstration here that Congress intended to exempt actions brought by the National Labor Relations Board from the limitation imposed by Section 2283, and we are not justified in extending the exemption doctrine applicable to the United States to that Board. As stated by the Supreme Court in *Amalgamated Clothing Workers, supra*, 514: "By that enactment [Section 2283], Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation,"

⁴To the same effect, see, *Norwood v. Parenteau*, 228 F.2d 148 (8th Cir. 1955), cert. den. 351 U.S. 955 (1954).

Many of the problems of state-federal relationship which Congress sought to avoid by enacting Section 2283 would not be avoided if by judicial improvisation we extended the doctrine of the *Leiter* case to include federal agencies not specifically granted the cloak of sovereignty by statute. The *Leiter* case, *supra*, involved the United States itself and not an agency of the United States.

We again hold that for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States. We further hold that Section 2283 is applicable to the National Labor Relations Board as a party seeking to enjoin a state court injunction or state court proceedings.

SECOND CONTENTION

The Board next contends that the area covered by the state court injunction has been preempted by Congress, and is within the exclusive jurisdiction of the National Labor Relations Board. Therefore, the Board asserts, Section 2283 does not apply as the state court is wholly without jurisdiction over the subject matter.

This contention of a general federal preemption of picketing so as to preclude applicability of Section 2283 previously has been unsuccessfully urged by the Board, and others, in other cases. In *Swift*, *supra*, loc. cit. 230, this court ruled the contention against the Board, citing and quoting from *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 515-516. There, speaking for the Supreme Court Mr. Justice Frankfurter stated: "In the face of this carefully considered enactment, [Section 2283]

we cannot accept the argument of petitioner and the Board, as *amicus curiae*, that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

We further declared in *Swift*, loc. cit. 516, that: "The [Supreme] Court, 348 U.S. at page 518, 75 S. Ct. at page 457 also fully answers the contention made in our present case, that if a State action is not halted the Federal labor relations plan will be disrupted, by stating that the State courts have for many years adequately protected Federal rights, and that: 'The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.'"⁵

Even more directly to the point, is the recent case of *Atlantic Coast Line R. Co. v. Engineers*, . . . U. S. . . . (1970), in which a federal district court enjoined a railroad from invoking an injunction issued by a Florida state court prohibiting certain picketing by the

⁵ The anti-injunction statute has been on the books in some form since 1793. See, Act of March 2, 1793, Ch. 22, § 5, 1 Stat. 335., Durfee & Sloss, Federal Injunction against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145 (1932).

Union.² Speaking through Mr. Justice Black, the Supreme Court reversed and declared: "First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers v. Richman Bros.*, supra, at 519-520, 99 L. Ed. at 609-610, 75 S.Ct. 452. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be 'necessary in aid of' that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."

* * * *

²*Atlantic Coast Line R. Co. v. Brotherhood of Engineers*, . . . U.S. . . . (1970), held that the prohibition in 28 U.S.C. § 2283 can not be evaded by addressing an order to the parties or by prohibiting utilization of the results of a completed state court proceeding. See also, *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940); *Hill v. Martin*, 296 U.S. 393 (1935).

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

We conclude there has not been any general preemption of the field so as to deprive the state court of jurisdiction over the subject matter and to cause Section 2283 to be inapplicable in a federal court proceeding to enjoin enforcement of a state court injunction.

THIRD CONTENTION

The Board further contends that if Section 2283 is applicable, the questioned activities are within the ambit of Sections 10(j) and 10(l) of the National Labor Relations Act and therefore within the "as authorized by an Act of Congress" or "in aid of its jurisdiction" exceptions to Section 2283. However, the Board has not issued a complaint in the instant case which will allow it to seek an injunction under the terms of 10(j) or 10(l) of the National Labor Relations Act.⁷ The picketing in this case which has been enjoined by the state court has never been made the subject of an unfair labor practice charge or complaint.⁸ The state court injunction does not concern itself with a refusal to bargain, interrogation of employees or solicitation of employees to withdraw from the Union or with any other matter before the Board in its unfair labor practice complaint of January 7, 1968.

⁷ 29 U.S.C. § 160 (j) and (l).

⁸ The federal trial court found "the picketing in question is not involved in the complaint issued by the Board on January 7, 1969."

Thus, the Board is not in a sound position on the record before us to successfully contend the requested federal injunction falls within the statutory exceptions "as authorized by an Act of Congress" or the "in aid of its jurisdiction," and in the light of the teachings in *Atlantic Coast Line R. Co. and Amalgamated Clothing Workers of America, supra*, we find no merit in the Board's contention in that regard.

The Board cites *Capital Service, Inc. v. N.L.R.B.*, 347 U.S. 501 (1954). There, the Company had filed suit in the state court for an injunction against the Union and, had also filed with the Board a charge of unfair labor practice against the Union. Each had as a basis the same conduct of the Union. The state court enjoined all picketing of retail stores. The Regional Director issued an unfair labor practice complaint of a limited nature and petitioned the federal district court for an injunction restraining such conduct of the Union pending final adjudication by the Board, as required by Section 10(1) of the Act. Simultaneously with the filing of the Section 10(1) petition, the Board filed suit in the same court asking that petitioner be enjoined from enforcing the state court injunction. The district court granted a preliminary injunction restraining the employer from enforcing the state court injunction. The Supreme Court affirmed, holding that the injunction issued by the District court was "necessary in aid of its jurisdiction" and thus permitted under the exceptions specifically allowed by Congress. However, *Capital Service, Inc.*, is clearly inapplicable here, for as earlier noted, there has not been any application by the Board for an injunction to restrain activities upon which a complaint has been issued by it. Nor are we confronted in the instant case with the same basic activity as that which

the state court had before it, for 10(j) and (l) has not been followed so as to present any picketing issue to the federal court.

Thus, we have concluded the federal district court correctly decided that in view of the limitations placed on it by 28 U.S.C. Section 2283 it did not have power to issue the relief requested by the Board.

MOTION TO INTERVENE

We also accord with the district court's denial of the motion of the Union to intervene entered after the trial court had determined it did not have power to grant the relief requested by the Board and dismissed the Board's complaint. Since the plaintiff—the Board,—had not brought its action within any of the exceptions to Section 2283, no proper purpose would be served by permitting the requested intervention. *Collins v. Laclede Gas Co.*, 237 F. 2d 633 (8 Cir. 1956); *Rosso v. Commonwealth of Puerto Rico*, 226 F. Supp. 688 (D. P.R. 1964).

In accordance with the reasons given above, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

Filed District of Nebraska, January 6, 1971, by
Richard S. Peck, Deputy
JUDGMENT

Nos. 19983-19993. SEPTEMBER TERM, 1970

No. 19983

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

NASH-FINCH COMPANY, D/B/A JACK & JILL STORES,
A DELAWARE CORPORATION AUTHORIZED TO DO BUSI-
NESS IN THE STATE OF NEBRASKA, APPELLEE

No. 19993

NATIONAL LABOR RELATIONS BOARD

v.

NASH-FINCH COMPANY, D/B/A JACK & JILL STORES,
A DELAWARE CORPORATION AUTHORIZED TO DO BUSI-
NESS IN THE STATE OF NEBRASKA, APPELLEE

v.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO, DISTRICT UNION 271,
APPELLANT

APPEAL FROM the United States District Court for
the-----District of Nebraska.

THIS CAUSE came on to be heard on the record from
the United States District Court for the-----
District of Nebraska and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 2, 1970.

Costs taxed in favor of the appellee:

Printing 25 copies of brief of appellee in Nos. 19983 and 19993, \$130.19.

Total costs of appellee, \$130.19, for recovery from appellants in the U.S. District Court.

A true copy.

Attest:

ROBERT C. TUCKER,
Clerk, U.S. Court of Appeals.
Eighth Circuit.

December 31, 1970.

APPENDIX B

[Caption Omitted in Printing]

MEMORANDUM AND ORDER, FILED SEPT. 26, 1969

VAN PELT, *Judge*: This matter comes before the Court on the motion of the National Labor Relations Board for a preliminary injunction to prevent the Nash-Finch Company (doing business as Jack & Jill Stores) from enforcing a state court injunction issued by the District Court of Hall County, Nebraska. The state court injunction restrains certain actions of individuals engaged in picketing Jack & Jill Stores in Grand Island, Nebraska. The picketing in question occurred during an attempt by Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO, District Union 271 to organize the meat cutters employed by Jack & Jill.

Also before the Court is the motion of Amalgamated to intervene as a party plaintiff in this action. Finally, Nash-Finch has filed a motion to dismiss the complaint. By agreement of counsel, all three motions were argued at a hearing held before this Court on September 12. The court, at the conclusion of that hearing, took submission of the motions. The matters raised by the motions now stand ready for determination.

It is the opinion of the Court that the jurisdictional question raised by the defendant, Nash-Finch, is dispositive of the case. We turn now to an examination of the power of this Court to grant the relief that the N.L.R.B. requests.

This matter is properly before this court under 28 U.S.C.A. § 1337 giving jurisdiction of questions arising under an Act of Congress to the District Courts. The National Labor Relations Act is such an Act. *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954).

However, in the instant case, this court is asked to restrain the enforcement of a state court injunction. In such a situation, there is a rigid limitation on the power of this court to act. 28 U.S.C.A. § 2283 provides:

"A Court of the United States may not grant an injunction to stay proceedings in a State Court except as authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The history of Section 2283 indicates that it is to be strictly construed and a particular case must be within the exceptions that are set out by the statute in order for an injunction to issue. *Amalgamated Clothing Workers of America, et al. v. Richmond Brothers, Co.* 348 U.S. 511 (1955). Thus, in order for the relief herein requested to be granted, the N.L.R.B. must bring itself within one of the above noted exceptions to Section 2283 or, in the alternative, show that this section does not apply in the instant case.

The N.L.R.B. offers three arguments to the effect that this Court has the authority to issue the injunction that is asked for. First, the Board argues that under the rationale of *Leiter Minerals, Inc. v. U.S.*, 352 U.S. 220 (1957), when the United States is the party applying for an injunction restraining state court proceedings, Section 2283 does not apply. Thus, the Board as an agency of the United States Government would also be excluded from the prohibition of Section 2283.

Secondly, it is argued that Section 2283 does not apply here as the state court is wholly without juris-

diction over the subject matter in that it has invaded a field preempted by Congressional legislation. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Finally, it is the Board's contention that the picketing in question is involved with the organizational activities which have been continuing over a period of time. In connection with these activities, an unfair labor practice charge has been filed with the Board by the Union. 29 U.S.C.A. §§ 160(j) and (l) authorize the Board to seek injunctive relief in specific circumstances concerning unfair labor charges. Thus, the Board argues, if this Court finds Section 2283 applicable to the instant case, the questioned activities are within the ambit of sections (j) and (l) and therefore within the "as authorized by an Act of Congress" or the "in aid of its jurisdiction" exceptions to Section 2283. *Capital Service v. N.L.R.B.*, 347 U.S. 501 (1954).

In examining the first contention of the Board, it is noted that the Court of Appeals for this Circuit has held that the Board did not stand in the position of the United States for the purposes of determining the applicability of Section 2283 in a suit for injunctive relief. *N.L.R.B. v. Swift & Company*, 233 F. 2d 226 (8th Cir. 1956). It is the position of the Board, however, that the United States Supreme Court's decision in *Leiter Minerals, Inc., supra*, has undermined the Court of Appeal's holding on this point. We believe that a careful examination of *Leiter* and other relevant cases in this area does not bear out this contention.

We begin with the proposition that the intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Recon-*

struction Finance Corporation v. J. G. Menihan Corp., 312 U.S. 81 (1941). The Court of Appeals in *Swift & Company, supra*, found that

"The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283." *Id* at 232.

We are of the opinion that in the instant case the Board has not established that it was the intention of Congress to bring it within the immunity of the United States insofar as concerns section 2283. While the *Leiter* case does establish the inapplicability of section 2283 to the United States, we find no justification in extending this doctrine to the National Labor Relations Board as an agency of the Government. To be considered is Mr. Justice Frankfurter's statement in *Amalgamated Clothing Workers, supra*, at 514 where he considers the import of the 1948 amendment to the predecessor of section 2283 which represents the section as it appears today.

"By that enactment, Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation."

We also are of the opinion that the Supreme Court's decision in *Amalgamated*, while bearing more directly on the second contention of the Board, also supplies compelling support for the position that the Board is not to be excluded from the prohibition of section 2283. This will be noted in the discussion of the pre-emption issue raised by the Board.

The Board next argues that the area covered by the state court injunction is within the exclusive jurisdiction of the N.L.R.B. and thus section 2283 does not apply. We feel that this argument is met squarely by the Supreme Court's findings in *Amalgamated Clothing Workers, supra*.

"In the face of this carefully considered enactment [§ 2283], we cannot accept the argument of the petitioner and the Board, as *amicus curiae*, that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

"We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartley Act is self-determining or even easy. As we have noted in the *Weber* case, 'the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.' 348 U.S. at 480. What is within exclusive federal authority may first have to be determined by this Court to be so." *Amalgamated Clothing Workers, supra*, at 515-16.

Thus, while we note, although not deciding, that the complained of picketing in the instant case may be within the exclusive jurisdiction of the N.L.R.B. by virtue of the *San Diego Building Trades Council* case, this without more does not remove the limitation on this Court's power to grant the injunctive relief requested.

This would also reinforce our determination that the Board should not be considered as having the Government's immunity to section 2283. If this Court

may not exercise its equity power to ban state courts from federally preempted areas, then there is no logic to the argument that the Board as administrator of the preempted areas and being vested with exclusive jurisdiction therein, should enjoy the exclusion from the operation of section 2283 when it seeks to protect this jurisdiction. Section 2283 provides that the Board will be exempt when the Court is "authorized by an act of Congress" to issue injunctive relief. The National Labor Relations Act in 29 U.S.C.A. 160 §§ (j) and (l) provides a remedy to the Board to protect this jurisdiction.

Thus, it is our conclusion that unless the Board can bring itself within one of the exceptions to section 2283, this Court is powerless to act in the case before us.

Preliminary to a discussion of this Court's authority to grant relief requested under sections 10(j) or 10(l) of the Act. It is necessary to set forth the chronology of events leading up to the instant case.

An unfair labor charge was filed by the Union with the Board on October 9, 1968 alleging unfair labor practices on the part of the company. A complaint was issued on January 7, 1969 and a hearing was held thereon on February 11 and 12, 1969. The Trial Examiner's Decision and Recommended Order was issued April 28, 1969.

The Trial Examiner found that the Company was engaged in unfair labor practices in that it refused to bargain with the Union as the exclusive representative of the employees in the appropriate unit, suggested the substitution of non-Union representation for Union representation, by soliciting revocation of prior Union authorizations, and by advising employees not to attend Union meetings and by coercively interrogating employees not to attend Union meetings and

by coercively interrogating employees concerning Union representation (Exhibit B, filing #1). No mention of picketing is found in the Trial Examiner's Decision or Recommended Order. After the issuance of the Decision, the Company took exception to the findings and the case is currently pending before the Board.¹

Approximately one month after the issuance of the Trial Examiner's Decision, the Union commenced picketing the Jack & Jill Store in Grand Island, Nebraska.

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for injunctive relief against the picketing. The court granted the requested relief on June 25, 1969 and issued a temporary injunction.

It will be noted that no charges concerning the picketing have been filed by the Company or the Union with the N.L.R.B. The Board has made no examination of the picketing either with regard to Union or Company activity.

Section 10 (j) of the Act reads:

"The Board shall have the power, upon the issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order." 29 U.S.C.A. § 160 (j)

Thus it would appear that for this Court to entertain a request for relief in a 10(j) proceeding, there

¹On September 21, 1969 an article appeared in the Lincoln Evening Journal indicating that the National Labor Relations Board had found for the Nash-Finch Company, thus rejecting the findings of the Trial Examiner.

must exist, as a prerequisite to the Board's application, a complaint which has as its basis the activities in question. *National Labor Relations Board v. Swift & Company*, 233 F. 2d 226 (8th Cir. 1956). As has been noted, the picketing in question here has not been the basis for the issuance of such a complaint. This being the case, it is the conclusion of this court that under the circumstances, section 10(j) does not authorize us to avoid the prohibitions of section 2283. We note that we do not determine that section 10(j) would allow this Court to exercise its jurisdiction should all proper prerequisites be met, leaving this question for future determination.

The question next arises as to whether section 10 (1) affords a proper basis upon which to issue the relief requested. In this regard, the Board relies upon *Capital Service Inc. v. N.L.R.B.*, 347 U.S. 501 (1954). In this case, the manufacturer filed an unfair labor practice charge against the union concerning picketing activities. He also filed suit in a California state court for injunctive relief. The Board issued an unfair labor practice complaint against the union on a limited basis and instituted a 10 (1) proceeding in the United States District Court for an injunction restraining certain activities occurring during the course of picketing. Approximately one month prior to this, the California state court had issued the requested relief. In the 10 (1) proceeding, the Board asked that injunctive relief issue against the state court injunction; the United States Supreme Court held that as the state court injunction and the properly requested injunctive relief from the District Court touched the same basic activity, the District Court had properly restrained the state court injunction within the meaning of the "in aid of its jurisdiction" exception to section 2283.

Thus, if we were, in the instant case, faced with an application by the Board for an injunction to restrain activities upon which a complaint had been issued, and were also confronted with a state court injunction which would interfere with the exercise of this Court's jurisdiction over the subject matter, we would be bound under the *Capital Service* case and the policies of the N.L.R.A. to restrain the enforcement of the state court decree. This is not the case here, however. The picketing in question is not involved in the complaint issued by the Board on January 7, 1969. If and when this complaint reduces itself to final adjudication by the Board and the Board applies to this Court for appropriate relief in a 10 (1) proceeding, the activities of the Company and those of the Union picketing are sufficiently separate to allow this Court to draft a decree against the Company without involving the picketing activities. See *N.L.R.B. v. Swift & Co. supra*.

It is the conclusion of this Court that it does not have the power by virtue of the limitations imposed upon it by section 2283 to issue the requested relief.

It may be pointed out that such a holding leads to the rather anomalous result. It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is particularly relevant here where picketing activities are involved and, as noted earlier in this opinion, Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

The United States Supreme Court in *Amalgamated Clothing Workers, supra*, at 520, poses a question which is yet to be answered and upon its determination, may provide a remedy for situations such as the Board and Union are faced with in the instant case. Mr. Justice Frankfurter notes that it has not yet been decided whether a company's application to a state court for an injunction covering federally preempted employee rights under § 7 and § 8(a)(1) of the Act, may, in itself, constitute an unfair labor practice. See Footnote 6, at 520. Thus, if this were so, the Union could file an unfair labor charge with the Board upon which a complaint could issue and, at that time, the Board could invoke the injunctive power of the Court under sections 10 (j) or 10 (l).

Our decision today does not cut off the Union or the Board from their rights of appellate review in both state and federal courts. Rather, we conclude that, under the factual situation found here, Congress has precluded this court from acting, seeking instead to maintain the traditional dichotomy of the federal and state courts. We assume, as it proper, that federally protected rights will be vindicated in state courts to the same extent that they would find vindication in the federal courts.

In view of the above,

IT IS ORDERED that the motion of the National Labor Relations Board for a preliminary injunction, being filing #2, should be and hereby is overruled and denied.

In view of our disposition of the case, we do not feel it necessary to determine on the merits the motion of the Union to intervene in this action. It will be noted that counsel for the Union appeared and was heard on matters touching all three motions at the September 12th hearing.

IT IS THEREFORE FURTHER ORDERED that the motion of the Union to intervene, being filing #3, should be and hereby is overruled and denied.

Finally, as it is this Court's determination that we are without jurisdiction to grant the relief requested.

IT IS THEREFORE FURTHER ORDERED that the motion of the defendant Nash Finch to dismiss, being filing #6, should be and hereby is sustained and the complaint is dismissed.

Dated: September 26, 1969.

By the Court:

ROBERT VAN PELT,
Judge, U.S. District Court.

APPENDIX C

TEMPORARY INJUNCTION ISSUED BY THE DISTRICT COURT OF HALL COUNTY, NEBRASKA

[Caption Omitted in Printing]

JOURNAL ENTRY

I, M. E. Moses; Clerk of District Court of Hall County Nebraska do here by certify the foregoing copy to be a full, true and correct copy of the original record thereof: Now remaining on file in said court: this 25th day of June 1967. M. E. Moses, Clerk of District Court, By Margaret Kozel.

This matter came on for hearing before the court on June 12, 1969, on plaintiff's application for a Temporary Injunction. Upon evidence adduced and this Court being fully advised in the premises, this Court finds that:

A. "Pickets" as involved in this action, are persons visibly displaying a sign on the person as set forth in Sec. 28-814.02 of laws of Nebr.;

B. That identity of individual pickets is necessary for the enforcement of any order of this Court;

C. That plaintiff is entitled to a temporary injunction of limited scope until the further order of the Court.

It is, therefore, ordered that upon approval of plaintiff's bond:

1. No person other than bona-fide members of defendant union shall engage in picketing unless such person shall have first submitted himself or herself

to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;

2. Pickets are limited to two at each Grand Island store location and pickets are enjoined from:

(a) Distributing hand bills or literature pertaining to the dispute along or upon public streets and highways in any manner which halts or slows the movement of traffic;

(b) Blocking or picketing entrances or exits to plaintiff's retail stores in Grand Island;

(c) Instigating conversations with plaintiff's customers in any matter relating to the dispute herein;

(d) Doing any act in violation of Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964.

3. That no person, other than a picket or the named defendants, shall, on behalf of defendants, in any manner whatsoever picket or loiter about the premises of plaintiff's Grand Island stores or disrupt ingress and egress thereto, nor display signs or distribute hand bills or literature or cause to be published or broadcast any information pertaining to the dispute existing between the parties hereto.

4. Bond to be deposited by plaintiff is fixed in amount of \$5,000.00.

JUNE 19, 1969.

DONALD H. WEAVER,
District Judge.

APPENDIX D

The relevant portions of the Nebraska anti-picketing statutes, Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964 provide, as follows:

28-812. *Picketing, defined; unlawful.* It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, indecent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purposes; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the

place of work or residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

28-814.01. *Mass picketing; unlawful.* It shall be unlawful for any person, singly or in concert with others, to engage in or aid and abet any form of picketing activity that shall constitute mass picketing as defined in section 28-814.02.

28-814.02. *Mass picketing; definition display of sign required.* (1) Mass picketing means any form of picketing in which there are more than two pickets at any one time within fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) Any person who shall legally picket by any means or methods other than forbidden in this section or in section 28-812 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be upper case lettering of not less than two and one half inches in height.

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In The
Supreme Court of the United States

October Term, 1970

70-93
No. ~~1420~~

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

V.

NASH-FINCH COMPANY, d/b/a JACK AND JILL
STORES, RESPONDENT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF AP-
PEALS FOR THE EIGHTH CIRCUIT

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In The
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NATIONAL LABOR RELATIONS BOARD,
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OPINIONS BELOW

The opinion of the Court of Appeals in the instant case (Pet. App. 15-27) is not yet officially reported, but it is unofficially reported at 76 L.R.R.M. 2860 (8th Cir. 1970). In addition, the memorandum and order of the District Court (Pet. App. 30-40) are not officially reported, but are unofficially reported at 72 L.R.R.M. 2373 (D. Neb. 1969).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966):

QUESTIONS PRESENTED

1. Whether or not the District Court correctly dismissed the Complaint of the National Labor Relations Board seeking an injunction of the State Court proceeding due to the limitations of 28 U.S.C. § 2283 (1965).

2. Whether or not the District Court had the power to issue the injunction sought by the National Labor Relations Board in light of the fact that no Complaint has been issued by the National Labor Relations Board under the provisions of the Labor Management Relations Act, as amended, concerning the factual situation in the instant case.

3. Whether or not the National Labor Relations Board stands in the same position as the United States in the instant case, thereby giving the District Court jurisdiction regardless of the provisions of 28 U.S.C. § 2283 (1965).

4. Whether or not the State Court and the state statute have invaded a field that has been preempted by Congressional legislation.

5. Whether or not the Doctrine of Federal Preemption gives the District Court independent jurisdiction in this matter regardless of the fact that the National Labor Relations Board has not invoked its jurisdiction under the Labor Management Relations Act, as amended.

STATUTES INVOLVED

The relevant Federal statutes involved in this case are 28 U.S.C. § 2283 (1965) and §§ 10 (j) and 10(1) of the Labor Management Relations Act as amended, 29

U.S.C. § 160(j) and (l) (1965), which are set out in Addendum A to this brief at p. 12. The relevant state statutes involved in this case, NEB. REV. STAT. §§ 28-812 and 28-814 (Reissue 1964), are set out in Addendum B to this brief, at p. 14.

STATEMENT

In August, 1968, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), began an organizing campaign among the meat department employees of the Jack & Jill Stores of the Nash-Finch Company (hereinafter referred to as the Company) in Grand Island, Nebraska.¹ The Union demanded recognition based upon signed authorization cards in August and the Company, expressing a good faith doubt in the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board (hereinafter referred to as the Board) for an election.

On October 9, 1968, the union filed an unfair labor practice charge with the Board alleging violations by the Company of Section 8(a)(1) and (5) of the Labor Management Relations Act, as amended (hereinafter referred to as the Act). A complaint was issued by the Board and the matter was set for hearing. On April 28, 1969, a Trial Examiner for the Board found that the Company had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union (A.12-18).² The Trial Examiner also found that the Company violated Section 8(a)(1) of the Act by suggesting that the

1 The Union had represented, for a number of years and continued to represent the meat department employees of the company's Hastings, Nebraska stores.

2 References designated "A" refer to the Appendix filed in the United States Court of Appeals for the Eighth Circuit in Case Nos. 19983 and 19993.

employees should resign from the Union and not attend Union meetings and by interrogating employees concerning the Union (A.18-25).

On September 17, 1969, the Board reversed the Trial Examiner's decision and concluded that the Company had not violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union,³ and that the Union had not represented a valid majority of the Company's employees when the August bargaining demand had been made. The Board did conclude that the Company had violated Section 8(a)(1) by its other actions and it issued a cease and desist order in that regard.⁴

After issuance of the Trial Examiner's decision and before issuance of the Board decision, the Union began picketing the Company's Grand Island, Nebraska stores. On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for injunctive relief against this picketing (A.30-34). On May 28, 1969, the State Court issued a restraining order against the Union and set the matter for hearing on June 8, 1969, regarding the issuance of that injunction (A.35-36). On June 25, 1969, the Court issued a temporary injunction enjoining: 1) anyone other than a bona fide member of the Union from picketing unless that person first subjected himself to the jurisdiction of the State Court by becoming a defendant in the State Court proceeding; 2) pickets from instigating conversations with the Com-

3 See *Nash-Finch Company d/b/a Jack and Jill Stores*, 170 N.L.R.B. No. 77, 72 L.R.R.M. 1144 (1969).

4 Pursuant to the cease and desist order of the Board, notices were posted in the Company's Grand Island stores on September 26, 1969, for the 60 consecutive days required by the Board's decision. It is uncontested that the Company has met compliance requirements for Case No. 17-CA-3697, but the case has not been closed due to a Board policy that a case should not be closed, even after compliance, if an injunction case is pending between the same parties.

pany's customers in any matter relating to the dispute; 3) anyone, other than qualifying pickets or named defendants, from picketing, handbilling or otherwise causing to be published or broadcast any information pertaining to the dispute between the Union and the Company; 4) the Union from having more than two pickets at each of the Company stores; 5) individual pickets from distributing handbills or literature pertaining to the dispute between the Company and the Union which would in any manner tend to halt or slow the movement of traffic into or out of the Company stores and 6) the Union and its pickets from doing any act in violation of the Nebraska Mass Picketing Statutes.⁵ (A.4-6).

No charges concerning the picketing or the State Court injunction have been filed by any party with the Board (A.55). Accordingly, there is no Board complaint outstanding regarding the picketing or the filing of the injunction in the State Court.

However, on August 29, 1969, the Board filed in the United States District Court for the District of Nebraska alleging that the injunction obtained by the Company in the State Court regulates and restrains peaceful picketing and that the regulation of such picketing has been preempted by the National Labor Relations Act (A.4-7). On September 5, 1969, the Board moved the District Court for a preliminary injunction seeking to restrain the Company from enforcing or attempting to enforce portions of the State Court injunction (A.37-38). On September 8, 1969, the Union moved to intervene as a party plaintiff in the action (A.39-41). Thereafter, the Company moved to dismiss the action on the ground

⁵ See NEB. REV. STAT. § 28-812, 28-814.01 and 28-814.02 (Reissue 1964). For the text of these statutes see Addendum B to this brief at page 14.

that the District Court did not have jurisdiction due to 28 U.S.C. § 2283 (1965) (A.48).

On September 26, 1969, the Honorable Robert Van Pelt, Judge of the District Court, granted the Company's Motion to Dismiss and dismissed the Board's complaint and denied the Union's Motion to Intervene on the ground that the District Court did not have jurisdiction due to the limitations of 28 U.S.C. § 2283 (1965) (hereinafter referred to as Section 2283) (Pet. App. 30-40). Thereafter, the United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 15-27), and the Board has now filed a petition seeking a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review that decision.

REASONS FOR NOT GRANTING THE WRIT

I.

The Contention of the Petitioner That the National Labor Relations Board Should Be Accorded Immunity to 28 U.S.C. § 2283 (1965) under the "United States" Exception Has Not Been Clearly Demonstrated by the Congress and the Eighth Circuit Was Therefore Correct in Affirming the District Court's Decision.

As noted by the Circuit Court, and by this Court in *Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), the limitations of 28 U.S.C. § 2283 (1965) may not be ignored. In addition to the three statutory exceptions contained within § 2283 itself, the Petitioner now comes before this Court urging a broadening of the "United States" exception to § 2283. However, as the Circuit Court correctly noted, the intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly

demonstrated. See (Pet. App. 20-22); *see also N.L.R.B. v. Swift & Co.*, 233 F.2d 226, 232 (8th Cir. 1956).

However, the Petitioner has not indicated any clear demonstration that the Congress has ever intended to bestow the privileges and immunities of the Government upon the National Labor Relations Board. Quite the contrary, this Court has previously determined that the Board is not entitled to the same privileges and immunities as the United States. See *Nathanson v. N.L.R.B.*, 344 U.S. 25 (1952); *see also N.L.R.B. v. Swift & Co.*, 233 F.2d 226, 232 (8th Cir. 1956); (Pet. App. 20-22).

II.

Since the Petitioner Has Failed to Exercise Its Statutory Authority as Expressly Authorized by an Act of Congress, It Should Not Now Be Allowed to Argue That the Decision of the Circuit Court Incorrectly Allows a State Court to Intrude into an Area Which Is Arguably Preempted by That Same Act of Congress.

Section 2283 indicates that a Federal Court may not grant an injunction to State proceedings in a State Court. However, Section 2283 provides an exception to that general limitation if such an injunction proceeding is "expressly authorized by an act of Congress." See 28 U.S.C. § 2283 (1965). The Labor Management Relations Act, as amended, authorizes the Petitioner to obtain injunctions in Federal District Courts under either Section 10(j) and 10(l) of the act. See 29 U.S.C. § 160(j) and (l) (1965). However, both of these sections of the Labor Management Relations Act require the Board to issue a complaint dealing with some unfair labor practice prior to seeking the injunction in Federal Court. See *Amalgamated Clothing Workers of America*

v. *Richman Bros.*, 348 U.S. 511, 516 1955). The Board argued before both the District Court and the Circuit Court that the Complaint in Board Case No. 17-CA-3697 concerning the Company's refusal to bargain with the Union and miscellaneous unfair labor practices involving interrogation and solicitation by the Company of its employees regarding the Union, provided the complaint necessary to utilize Sections 10(j) and 10(l) of the Act. However, it is so obvious that the picketing at issue in the instant case has never been made the subject of an unfair labor practice charge, much less an unfair labor practice complaint that both the District Court and the Circuit Court rejected this argument of the Petitioner (Pet. App. 36-37; 25-27).

Accordingly, the Petitioner has now seemingly abandoned that argument before this Court in stating that this Court should grant the Writ in the instant case for the reason that this Court has not yet decided whether or not a Federal agency may enjoin state court intrusions into an area of exclusively Federal jurisdiction in cases in which the specific statutory exceptions of § 2283 are not met. See Petitioner's Brief at page 8. Of course, it is undisputed that the very statutes which arguably preempt the area for Federal jurisdiction are the same statutes that provide that a complaint must be issued prior to the time at which the Petitioner may seek an injunction in a Federal Court. Thus, simply stated, the Petitioner is urging this Court to review a case because of a Federal statute, even though the Federal agency established by that statute has not conformed with the requirements of said statute.

The Respondent urges the Court to reject this anomalous argument on the part of the Board. The point remains that if a Federal statute preempts an area for

Federal jurisdiction, then the Federal agency administering that statute must conform to the requirements of the statute before it may be heard to cry "Federal pre-emption" in a case such as this. The Congress did not authorize the Labor Board to go off around the country seeking injunctions of state court proceedings on its own initiative. Rather, the Congress gave this power to the Labor Board only after an unfair labor practice had been charged, and a complaint had been issued by the Labor Board. The area in question may have been Federally preempted by the passage of the Labor Management Relations Act, as amended, but the Labor Board was specifically restricted, by the provisions of that Act, in its power to seek injunctions in Federal Court.

Therefore, the presence of the Labor Board before this Court urging that it should be allowed to seek injunctions in Federal Court on the power of the pre-emption of the Federal statutes in the Labor Relations area, but without regard to the limitations contained in these Federal statutes on the power of the Labor Board to seek injunctions in Federal Court is anomalous to say the least.

The Labor Board may not like the restrictions on its power, but it is for the Congress, not this Court, to change those restrictions.

III.

The Petitioner Has Not Shown Why the Instant Case Involves Matters of "Manifest Administrative Importance" Which Compel the Granting of the Writ in the Instant Case.

In the third reason stated by the Petitioner for the granting of a Writ in the instant case, a broad statement

is made that the question of whether or not Section 2283 is applicable to suits brought by the National Labor Relations Board is of "manifest administrative importance." See Petitioner's Brief at page 12. The Petitioner goes on to state that the importance is found in the "significant bearing" on the relation between Federal and State Courts in labor disputes affecting Interstate Commerce. See Petitioner's Brief at page 12. However, the relationship between Federal and State Courts in all disputes affecting Interstate Commerce has long been a question, and a potential problem, as explained by this Court in *Atlantic Coastline Railroad Co v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Accordingly, the argument raised by the Petitioner is not new, and the Petitioner made absolutely no attempt to explain what "manifest administrative importance" surrounds the instant case. Apparently, the only administrative importance actually involved in the instant case that is "manifest" is found in the fact that a number of administrators at the National Labor Relations Board have been attempting to get around the limitations of Section 10(j) and 10(l) of the Labor Management Relations Act and the attendant limitations of 28 U.S.C. § 2283 (1965) for some time and this matter of getting around statutory limitations is of such "manifest" importance to these administrators that they seek to bring the issue before this Court. However, the particular desires of certain administrators to escape statutory limitations placed upon them by the Congress of the United States, without more, hardly presents a matter of sufficient importance to occupy the time and attention of this Court.

CONCLUSION

For all the foregoing reasons, the Respondent urges this Court to conclude that a Writ of Certiorari should be denied.

Respectfully submitted,

NASH-FINCH COMPANY, d/b/a
JACK and JILL STORES, Respondent,

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Attorneys for Respondent

DATED at Lincoln, Nebraska
this 2d day of April, 1971.

ADDENDUM A

FEDERAL STATUTES

Section 2283

28 U.S.C. § 2283 (1965)

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

LABOR MANAGEMENT RELATIONS ACT, as amended, Section 10(j), 29 U.S.C. § 160(j) (1965)

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Section 10(1), 29 U.S.C. § 160 (10) (1965)

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should is-

sue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

ADDENDUM B

STATE STATUTES

NEBRASKA MASS PICKETING STATUTE,

Section 1, Neb. Rev. Stat. Section 28-812 (Reissue 1964)

28-812. Picketing, defined; unlawful. It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere, with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, indecent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purpose; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the place of work or residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

Section 2, Neb. Rev. Stat. Section 28-814.02 (Reissue 1964)

28-814.02. Mass picketing; definition; display of sign required. (1) Mass picketing means any form of picketing in which there are more than two pickets at any one time within either fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) Any person who shall legally picket by any means or methods other than forbidden in this section or in section 28-812 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be upper case lettering of not less than two and one half inches in height.

Section 3, Neb. Rev. Stat. Section 28-814.03 (Reissue 1964)

28-814.03. Picketing; interference; unlawful; exception. It shall be unlawful for any person, acting separately or with others, to interfere with any picketing not described as mass picketing in section 28-814.02; Provided, this shall not apply to duly qualified law enforcement officers or to court action.

Section 4, Neb. Rev. Stat. Section 28-814.04 (Reissue 1964)

28-814.04. Picketing; intimidation; unlawful. It shall be unlawful under section 28-814.01 to 28-814.05. for any person, firm or corporation to intimidate or attempt to intimidate any striker by threat of the loss of any right or condition of employment, that directly or indirectly would affect the lawful conduct of said striker in any way.

Section 5, Neb. Rev. Stat. Section 28-814.05 (Reissue 1964)

28-814.05. Picketing; violation; penalty. Any person who shall violate any of the provisions of section 28-812 or sections 28-814.01 to 28-814.05 or who shall aid or abet in such violation shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars, or imprisonment in the county jail for not more than three months, or by both such fine and imprisonment. Each violation shall constitute a separate offense.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1420

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF IN
OPPOSITION TO THE PETITION**

This reply brief is directed to the Company's contention (Br. in Opp. 7-9) that the present suit was properly dismissed for the additional reason that the Board did not comply with the requirements of Sections 10(j) and 10(l) of the National Labor Relations Act, 29 U.S.C. 160(j) and (l), before seeking a federal court injunction. This contention misconceives the nature of the Union's picketing and the effect of the Company's state court injunction.

Section 10(l) of the Act provides that, upon the filing of a charge that a union has engaged in secondary boycott or picketing activity violative of Sections 8(b)(4) or 8(b)(7) of the Act, 29 U.S.C. 158(b)(4),

(1)

(7), the Board's regional director, if he finds reasonable cause to believe that the charge is true, shall file a petition in the federal district court for an injunction against such activity pending a final adjudication by the Board. Section 10(j) provides similar authority in respect to other unfair labor practice conduct. However, neither of these provisions could be invoked here.

The Company did not file charges with the Board claiming that the Union's picketing violated Sections 8(b)(4) or 8(b)(7) of the Act, and, even if it had, the charges would undoubtedly have been dismissed for the picketing, far from violating those Sections, is protected by Section 7 (see Pet. 12, n. 8). Hence, there was no basis for seeking an injunction under Section 10(1) of the Act. Moreover, since the Board has held that an employer's resort to a court to enjoin activity protected by Section 7 does not violate Section 8(a)(1), *Clyde Taylor*, 127 NLRB 103, 109, a charge against the Company for interfering with that activity would lie only if it had resorted to the "unsatisfactory remedy of using 'self help,'" *Int'l Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 202 (concurring opinion of Mr. Justice White). Accordingly, there was likewise no basis for obtaining an injunction under Section 10(j). The only effective means of eliminating the interference with activity preempted by the National Labor Relations Act which occurred here was the independent suit which the Board brought to nullify the force of the state court injunction.

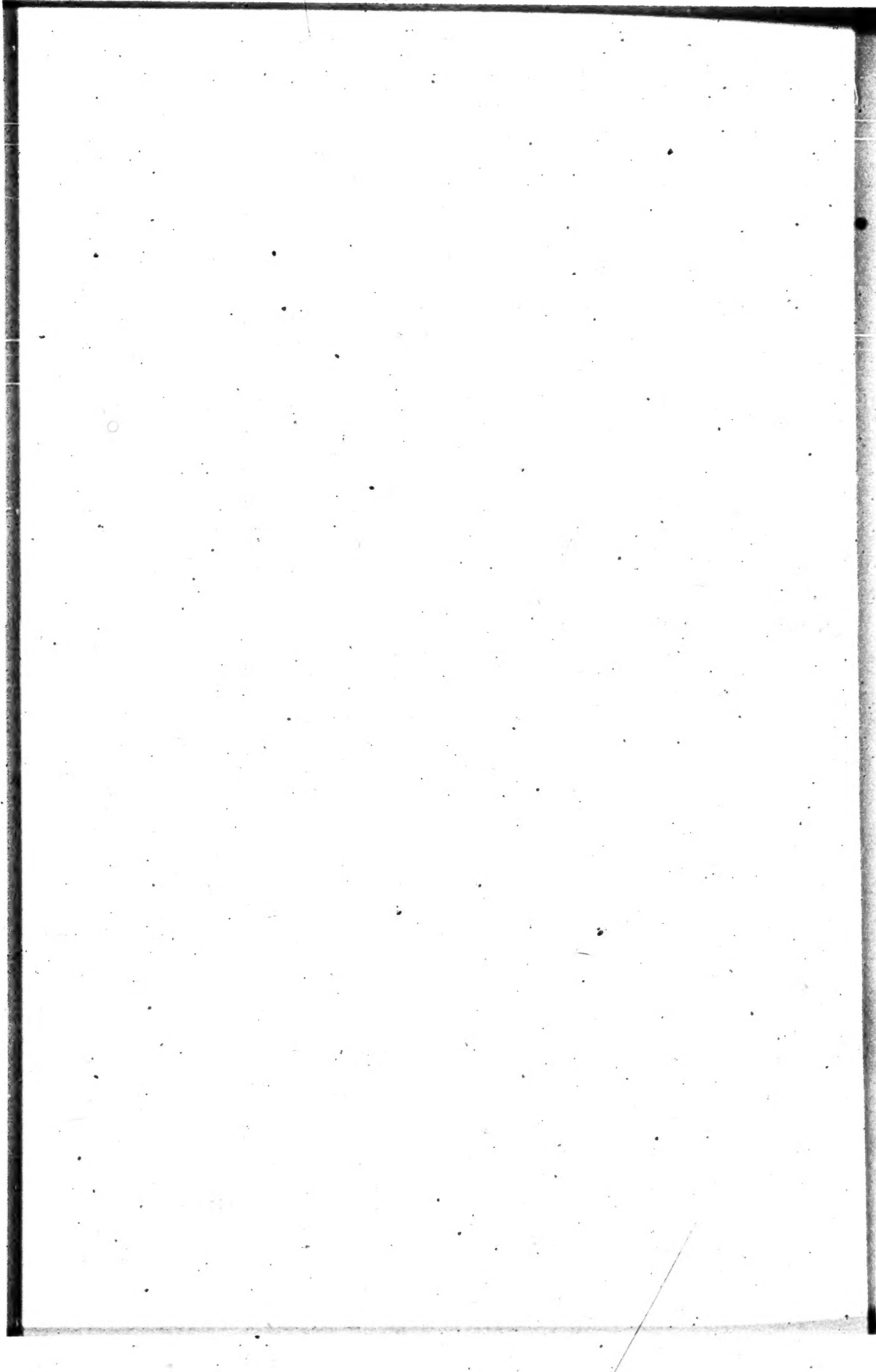
For these reasons, as well as those set forth in the petition, the petition should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

APRIL 1971.



Supreme Court, U.S.

FILED

JUN 10 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. ~~1420~~

70-93

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NASH-FINCH COMPANY, D/B/A JACK AND JILL
STORES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF FOR THE AMALGAMATED MEAT CUTTERS
AND BUTCHER WORKMEN OF NORTH AMERICA,
AFL-CIO, DISTRICT UNION NO. 271, AS AMICUS
CURIAE.**

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OCTOBER TERM, 1970.

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NATIONAL LABOR RELATIONS BOARD,

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NASH-FINCH COMPANY, D/B/A JACK AND JILL
STORES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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**BRIEF FOR THE AMALGAMATED MEAT CUTTERS
AND BUTCHER WORKMEN OF NORTH AMERICA,
AFL-CIO, DISTRICT UNION NO. 271, AS AMICUS
CURIAE.**

INTRODUCTION.

This *amicus* brief is filed by the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, District Union No. 271, as provided in Rule 42(2) of the Rules of the Supreme Court, petitioner and respondent having given their consent for the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union No. 271 to file as *amicus curiae*.

The opinions below, jurisdiction, question presented and the statutory provisions involved are set out in the petitioner's brief.

INTEREST OF THE AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, DISTRICT UNION NO. 271.

The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union No. 271 (hereinafter referred to as "the Union") was the Respondent in the injunction proceedings in the District Court of Hall County, Nebraska, and unsuccessfully sought to intervene as a party plaintiff in the proceedings brought by the National Labor Relations Board (hereinafter sometimes referred to as "Board" or "NLRB") in the United States District Court, District of Nebraska. The Union was also an appellant in the proceedings below. The Union sought intervention in the Federal District Court as a matter of right on the ground that a federal ruling against the Board could be used by Nash-Finch Company (hereinafter referred to as "the Company" in the State Court litigation to rebut the Union's claim that the Company's suit trenches on federally protected rights. Because the outcome of this litigation, to determine whether the NLRB can obtain a federal court injunction to restrain a state court from prohibiting the Union from peacefully picketing, will directly affect the Union's interests, this brief presents the Union's views of the issue before this Court.

ARGUMENT.

I. THE NEBRASKA ANTI-PICKETING STATUTE AND THE STATE COURT INJUNCTION ISSUED THEREUNDER ARE UNLAWFUL INFRINGEMENTS ON CONSTITUTIONAL AND FEDERALLY PROTECTED RIGHTS.

A. The Nebraska Statute Is Unconstitutionally Broad and Vague.

The Nebraska anti-picketing statute (Sections 28-812, 28-814.01 and 28-814.02, R. S. Neb. 1964) prohibits, *inter alia*, "loitering about, picketing or patrolling" so as "to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment." The statute also prohibits "mass picketing" which is defined as picketing in which there are more than two pickets at any time within fifty feet of any entrance or of another picket. Pursuant to this statute, the District Court of Hall County, Nebraska enjoined the Union *inter alia* from:

1. distributing hand bills or literature in any manner which slows traffic;
2. picketing entrances or exits of the Company's stores;
3. instigating conversations with the Company's customers "in any matter relating to the dispute herein"; and
4. doing any act in violation of the State anti-picketing law.

Further, the Court limited the number of pickets to two per store, proscribed picketing by other than bona fide members of the Union unless such person submitted to the

Court's jurisdiction by filing an appearance therein as a defendant, and prohibited anyone other than pickets from displaying signs or distributing handbills "or caus[ing] to be published or broadcast any information pertaining to the dispute existing between the parties hereto" (A. 7-8).

In considering the impact of the decision of the Court below it is important to note the clear unconstitutionality of the Nebraska anti-picketing law and of the injunction issued by the Nebraska Court pursuant to that law, as well as the lack of state court jurisdiction over this preempted area of peaceful concerted activity. See *e.g.*, *Thornhill v. State of Alabama*, 310 U. S. 88 (1940); *Liner v. Jafco, Inc.*, 375 U. S. 301 (1964); *United Auto Workers v. O'Brien*, 339 U. S. 454 (1950); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U. S. 308 (1968); *Carlson v. People of State of California*, 310 U. S. 106 (1940); *Bakery Drivers v. Wohl*, 315 U. S. 769 (1942); *Milk Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 292 (1941); *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957); *Garner v. Teamsters Union*, 346 U. S. 485, 499-500 (1953); *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959). For example, § 28-812, R. S. Neb. 1964, which defines unlawful picketing, on its face prohibits peaceful picketing for any lawful purpose unless the person picketed consents to such activity. Such a provision is an unconstitutional limitation on free speech. See *Amalgamated Food Employees Union v. Logan Valley Plaza*, *supra*; *Thornhill v. State of Alabama*, *supra*. Equally unconstitutional is subsection (1) of § 28-814.02, which defines "mass picketing" as two pickets within 50 feet of any entrance or of one another. By so limiting the number of pickets without regard to the factual circumstances in particular cases, the Nebraska legislature has gone far beyond the area of permissible regulation of conduct protected by the First Amendment. See *Milk Drivers Union v. Meadowmoor Dairies*, *supra*; *Thornhill v.*

State of Alabama, supra; *Carlson v. People of State of California, supra*; *Davis v. Francois*, 395 F. 2d 730, 735 (5 Cir. 1968).¹ Subsection (2) of § 28-814.02 also suffers a constitutional infirmity under the First and Fourteenth Amendments by regulating the content of picket signs and the size of type appearing thereon. See, e.g., *Talley v. State of California*, 362 U. S. 60 (1960); *Zwickler v. Koota*, 290 F. Supp. 244, 251-258 (E. D. N. Y., 1968) (3 judge court), reversed on other grounds *sub nom. Golden v. Zwickler*, 394 U. S. 103 (1969).

B. The State Court Injunction Unconstitutionally Prohibits Activity Protected by the First Amendment.

The breadth of the Nebraska Court's injunction restraining the Union from "doing any act in violation of" the criminal picketing statute and the resulting threat of contempt proceedings for any statement or act which might subsequently be determined to have violated that far-reaching law, clearly violates the First Amendment rights of those enjoined. See, e.g., *Thomas v. Collins*, 323 U. S. 516 (1945); *Near v. Minnesota*, 283 U. S. 697 (1931).

Equally impermissible under the First Amendment are the provisions which prohibit anyone from picketing who is not a "bona-fide" member of the Union "unless such person shall have first submitted himself or herself to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;" which prohibit pickets from "instigating conversations with plaintiff's customers in any matter relating to the dispute herein;" and which restrain anyone other than the named defendants and qualified pickets from, on behalf of the Union, "in any manner whatsoever" picketing the Com-

1. In the instant case, the State Court injunction is even more restrictive than the statute insofar as it limited the number of pickets to two per store.

pany's premises, displaying signs or distributing handbills or literature, or "caus[ing] to be published or broadcast any information pertaining to the dispute existing between the parties hereto" (A. 7-8). The cases cited *supra*, p. 4, make clear beyond cavil that the limitations thus imposed by the State Court must not be permitted to stand. They constitute a blatant infringement on the right of free people to express their views and thoughts.

C. The State Court Injunction Entered Upon a Federally Preempted Area.

Nor is extended discussion required to establish that the picketing enjoined by the Nebraska Court is activity protected by Section 7 of the National Labor Relations Act and therefore a federally preempted area over which the State Court has no jurisdiction. *Garner v. Teamster Union, supra*; *San Diego Building Trades Council v. Garmon, supra*. This Court noted in *Garner*,² that the National Labor Relations Act contains a:

detailed prescription of the procedure for restraint of specified types of picketing [which] would seem to imply that other picketing is to be free of other methods and sources of restraint * * *. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare free picketing for purposes or by methods which the federal Act prohibits.

The vital importance of preventing state injunctions from frustrating federal policy outweighs considerations of comity between state and federal courts. This is an area of judicial decision

* * * within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. * * * When a federal statute [protects] an

2. 346 U. S. at 499-500.

act as [lawful] the extent and nature of the legal consequences of the [protection], though left by statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, Cl. 2; * * *. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).

To deprive the NLRB of access to the federal courts to ensure uniform regulation of the federal statute it administers would frustrate national policy.

II. SERIOUS HARM TO THE UNIFORM ENFORCEMENT OF FEDERAL LABOR LAW WOULD RESULT FROM PERMITTING STATES TO EXERCISE UNRESTRICTED REGULATORY POWERS OVER PEACEFUL PICKETING.

The necessity that Section 2283 be applied so as to permit the National Labor Relations Board to seek federal injunctive relief against state regulation of picketing is made evident by analysis of the diverse state statutes "imping[ing] on th[is] area of labor combat." *Garner*, 346 U. S. at 500.

A. State Statutes Regulating Peaceful Picketing Are Various and Diverse.

Twelve states have laws specifically regulating peaceful picketing.³ For example, the North Dakota Statute provides that:

in any strike in this state it shall be illegal for any person other than an employee of the particular establishment against which such strike is called or a local

3. Arkansas [§ 81-207, Ark. Stat. Ann.]; Colorado [§ 80-5-8(15), Colo. Rev. Stat.]; Florida [Chap. 21968, Fla. Stat.]; Hawaii [§ 300-2, Rev. Laws of Hawaii]; Minnesota [§ 179.11, Minn. Stat.]; Nebraska [§ 28-812, 28-814.01, 28-814.02, R. S. Neb.]; North Dakota [§ 34-0912, N. D. Rev. Code]; South Dakota [§ 17.1112, S. D. Code]; Texas [Art. 5154d V. A. C. S.]; Utah [§ 34-20-8, Utah Code Ann.]; Virginia [Ch. 674, § 40-64, Code of Virginia]; and Wisconsin [§ 111.06 (2), Wisc. Stat.].

resident member of union representing the employees of such establishment to picket in aid of such strike [Sec. 34-0912, N. D. Rev. Code].

See also, Chap. 674, § 40-64, Code of Virginia, and Sec. 17.1112(5), South Dakota Code. Several states have statutory definitions of what constitutes prohibited mass picketing:

picketing by a greater number than five percent of the first one hundred striking or locked out employees of the picketed employer and one percent of the employees in excess of this number * * * [§ 17.112(5), South Dakota Code].

any form of picketing in which: 1. There are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets [Art. 5154d, § 1, V. A. C. S.—Texas].⁴

In some states where no statute specifically regulates picketing, vague and broad criminal statutes prohibiting interference with business can be utilized to enjoin peaceful picketing.⁵ For example, the Code of Alabama provides:

Sec. 54. CONSPIRACY, COMBINATION OR AGREEMENT TO INTERFERE WITH OR HINDER BUSINESS, UNLAWFUL—Two or more persons who, without a just cause or legal excuse for so doing, enter into any combination, conspiracy, agreement, arrangement or understanding for the purpose of hindering, delaying or preventing any other persons, firms, corporation or association of persons from carrying on any lawful business, shall be guilty of a misdemeanor [Title 14, Chap. 20].⁶

4. The Nebraska statute passed in 1949 is identical to this 1947 Texas statute in its definition of mass picketing.

5. Alabama [Title 14, Chap. 20, § 54, Title 26, § 336, Code of Ala.]; Connecticut [§ 53-179, Gen. Stat. of Conn.]; and Delaware [Chap. 197, L. 1961 (amended, Chap. 351, L. 1966)].

6. The companion section, Sec. 55, prohibiting loitering and picketing was declared unconstitutional by this Court in *Thornhill v. State of Alabama*, 310 U. S. 88 (1940).

Sec. 336. **INTERFERENCE WITH EMPLOYMENT.** Any person who * * * by any means of duress, prevents or seeks to prevent another from doing work or furnishing materials, or from contracting to do work or furnish materials, for or to any person engaged in any lawful business, or who disturbs, interferes with, or prevents, or in any manner attempts to prevent the peaceable exercise of any lawful industry, business or calling by any other person, must, on conviction, be fined not less than ten nor more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than twelve months [Title 26].

See *Hardie-Tynes Mfg. Co. v. Cruse*, 189 Ala. 66, 66 So. 657, where the Alabama Supreme Court held that this law constitutionally could prohibit picketing and peaceful solicitations where the intent and effect of such activity was to interfere with business operations.

B. The Uniformity of Federal Labor Law Could Be Seriously Impaired by Adherence to the Rationale of the Court Below.

The impact of the decision of the Eighth Circuit Court of Appeals in the instant case would be to submit clearly federally protected rights to the vagaries of State laws such as those cited above. Any picketing at all may be held to be legal at a Georgia location but illegal across the border in Alabama. Picketing by more than two persons could be prevented in Nebraska, restricted in South Dakota, North Dakota and Minnesota but legally permissible in Iowa—all contiguous jurisdictions. Such a situation clearly “impinge[s] on the area of labor combat designed to be free” from restraint, and obstructs paramount fed-

eral policy. *Garner*, 346 U. S. at 500.⁷ The federal government must have access to the federal courts to protect from varying degrees of state impairment the federally protected rights guaranteed by Section 7 of the National Labor Relations Act and to ensure continued uniform development of national labor policy. As this Court said in *Liner v. Jafco, Inc.*, 375 U. S. at 306-308:

If the peaceful picketing complained of in this case is [arguably protected or prohibited] conduct, Congress has ordained—to further uniform regulation and to avoid the inconsistencies which would result from the application of disparate state remedies—that only the federal agency shall deal with it. *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468. The issuance of the state injunction in this case tended to frustrate this federal policy. This would be true even if the picketing were prohibited conduct * * *.

Federal injunctive relief is particularly vital in cases such as the instant case where state injunctions have dele-

7. Moreover, it should be noted that many of the states having statutes regulating picketing (Arkansas, Florida, Nebraska, South Dakota, Texas and Virginia) or prohibiting interference with business (Alabama and Delaware) do not have anti-injunction statutes (so-called "little Norris-LaGuardia Acts") preventing restraints in labor disputes. Thus judges in those states are free to issue broad injunctions, such as that issued by the Nebraska Court herein, regulating picketing activity in conjunction with unfair labor practice strikes or other labor disputes. For example, in *Machinists v. Stephens*, 437 S. W. 2d 917 (Texas Ct. Civ. App. 1968) the trial court enjoined the Union from in any manner interfering with Stephens' business, the effect of which was to prohibit all peaceful picketing. The Texas Supreme Court, thirteen months after the trial court's decision, modified the injunction to prohibit only public display of misrepresentation. In *McMahon v. Milam Mfg. Co.*, 127 So. 2d 647, reversed *per curiam*, 368 U. S. 7 (1961), the trial court decision, affirmed by the Mississippi Supreme Court, enjoined all peaceful picketing advertising the existence of a strike at another location of an alleged single employer. State laws and court decisions based thereon show the variety of results and conflicts which may result from such a departure from the *Garmon* rationale.

terious effect on the free expression of grievances against persons who have committed unfair labor practices.

[T]he granting of injunctive relief against a participant in a labor dispute, as the state court did in this case, is a matter Congress intended to be done only after sensitive procedures have been followed. An injunction in a labor dispute may cause irreparable harm. Use of the injunction as a panacea against strikes and other concerted activity was widespread before the adoption of our national labor legislation, and the devastating effect it had upon labor organizations was one of the strongest reasons for our national laws. *N. L. R. B. v. Roywood Corporation*, 429 F. 2d 964, 968 (5 Cir. 1970).

By the time injunctions are removed through lengthy appellate processes, resumption of picketing is often futile due to the dissipation of employee and public interest, employee turnover and other changes in the situation.

It is not sufficiently protective of overriding federal labor policies that this Court may ensure uniformity by reviewing conflicting state court decisions regulating labor activities.

Once [a state court injunction] is granted, the long, drawn-out appeal through the state hierarchy and on to this Court commences. Yet by the time this Court decides that from the very beginning the state court had no jurisdiction, as it must under the principle of *Garner* * * *, a year or more has passed; and time alone has probably defeated the claim. *Amalgamated Clothing Workers v. Richman Brothers*, 348 U. S. at 526 (1955) (Justice Douglas, dissenting).

The above-cited estimate of a one year delay to process an appeal was optimistic. The injunction issued by the State Court in *Bakery & Pastry Drivers v. Wohl*, 315 U. S. 769

(1942) remained in effect for three years before this Court set it aside. This time lag is not unusual. See *Interlake Steamship Co. v. Marine Engineers Ass'n*, 370 U. S. 173 (1962);⁸ *McMahon v. Milam Mfg. Co.*, 368 U. S. 7 (1961);⁹ *Broadcast Service of Mobile Inc. v. Local 1264, I. B. E. W.*, 380 U. S. 255 (1965);¹⁰ *Hattiesburg Bldg. Trades Council v. Broome*, 377 U. S. 126 (1964);¹¹ *Ex Parte George*, 371 U. S. 72 (1962);¹² *Liner v. Jafco, Inc.*, 375 U. S. 301 (1964).¹³ Even in cases where the injunctions are invalidated or modified within the state court appellate processes, long delays are inherent. See *City Line Open Hearth v. Hotel Employees*, 413 Pa. 420, 197 A. 2d 614 (Pa. S. Ct. 1964) [one year]; *Schwartz-Torrence Investment Corp. v. Bakery Workers*, 394 P. 2d 921, 40 Calif. Rptr. 233 (Calif. Dist. Ct. App. 1963), cert. denied, 380 U. S. 906 (1965) [17 months]; *Great Leopard Market v. Amalgamated Meat Cutters*, 413 Pa. 143, 196 A. 2d 657 (Pa. S. Ct. 1964) [one year]; *Continental Slip Form Builders v. Laborers Local 1290*, 195 Kan. 572, 408 P. 2d 620 (Kansas S. Ct. 1965) [31 months]; *Corrigan v. Barbers Union*, P. 2d, 65 LRRM 2973 (Calif. S. Ct. 1967) [25 months]; *Machinists*

8. The injunction issued in November 1959 was invalidated in June 1962: see 260 Minn. 1, 108 N. W. 2d 627 (Minn. S. Ct. 1961).

9. The Mississippi Court enjoined peaceful picketing in March 1959; this Court reversed the lower court's opinion in October, 1961: see 127 So. 2d 647 (Miss. S. Ct. 1961).

10. An injunction against peaceful picketing in violation of Alabama law cited *supra*, pp. 8-9, was issued in September 1963 and invalidated in March 1965: see 159 So. 2d 452 (Ala. S. Ct. 1963).

11. An injunction issued by a Mississippi court in October, 1961 was dissolved in April 1964: see 153 So. 2d 695 (Miss. S. Ct. 1964).

12. The injunction was in effect from June, 1961 to November 1962: see 358 S. W. 2d 590 (Tex. S. Ct. 1962).

13. In January 1964, this Court invalidated a temporary injunction issued by a Tennessee court in August 1960: see Tenn., 49 LRRM 2382 (Tenn. Chanc. Ct. 1961), 49 LRRM 2585 (Tenn. Ct. App. 1961).

v. *Stephens*, 437 S. W. 2d 917 (Texas Ct. Civ. App. 1968) [13 months].

As we have shown above, important considerations of uniform interpretation of federal law require exercise of federal jurisdiction to prohibit state regulation of peaceful picketing which is either arguably protected or prohibited. There is additional compelling reason for federal intervention where protected activity is involved. Whereas prohibited activity may be justifiably subject to injunctive control, no justification exists for such interference with protected activity in the form of peaceful picketing. Thus when state courts prohibit clearly lawful activities protected by the NLRA, such as here, the serious harm to employees' rights continues until vindicated through laborious and time consuming appellate procedures. Therefore, injunctive relief in federal court must be available to expedite review of interference with rights guaranteed by the NLRA and the First and Fourteenth Amendments to the Constitution. In the instant case, for example, the Federal District Court decision issued only three months after the issuance of the state court injunction. While any judicial interference with lawful picketing has deleterious effects upon such activity, the relative speed of the federal court's determination renders that forum more efficacious than the state courts in which it may take three years to invalidate anti-picketing injunctions.

Moreover, the federal court is clearly the appropriate forum for the NLRB, as the administrator of national labor policy, to bring litigation to protect the public rights articulated in the NLRA. As the Court of Appeals for the Fifth Circuit said in *N. L. R. B. v. Roywood Corporation*, 429 F. 2d at 970:

the impact of national labor legislation cannot be confined to those cases in which the Board had under-

taken proceedings, whether formal or informal. As we have already indicated, refusal by the Board to take action may mean that it views the conduct it is being asked to act against as protected by law. Thus an injunction by a state court interfering with arguably protected conduct may pose dangers of conflict with the federal scheme of regulation irrespective of whether the Board is hearing a formal controversy at the time. In such a case, the Board is entitled to sue and entitled upon proving its case to an injunction, not merely to protect its jurisdiction over a particular controversy but to safeguard the integrity of the national labor laws. When the Board so sues, it need not fit its case into one of the confining exceptions of section 2283, nor need it bear the heavy burden of showing its case "exceptional" in immediate impact between the parties to the dispute. It sues not as a private party but as an agency of the United States Government charged with administering the national labor laws, and its judgment that there is sufficient danger to those laws to warrant an injunction is entitled to great weight.

The Eighth Circuit's attempted distinction between the United States and the NLRB is clearly spurious insofar as it fails to recognize the importance of the Board's function as the primary agency of the United States which is empowered to protect national labor policy expressed in §§ 7, 8 and 9 of the National Labor Relations Act. Accordingly, as the Court recognized in *Roywood, supra*, the Board must be in a position to stop state proceedings which, in the Board's judgment, will impair the administration of that national policy. Nothing in *Amalgamated Clothing Workers v. Richman Bros. Co.*¹⁴ derogates from the foregoing conclusion. For in *Richman* a private party seeking to protect private rights brought suit in federal court to enjoin state court proceedings. The policy distinctions between cases in which the "federal government seeks the aid

14. 348 U. S. 511 (1955).

of its courts in protecting a federal interest," and cases brought by a private party which threaten to interfere with federal-state comity have been recognized by this Court. *Leiter Minerals v. United States*, 352 U. S. 220 (1957). The exercise of federal jurisdiction at the Board's behest would not bring the state and federal judiciary into frequent conflict. For the Board would be able to screen cases involving state injunctions and bring federal litigation only when, in the Board's view, state proceedings threatened serious impairment of national labor policy. As this Court said in *Leiter Minerals v. United States*, 352 U. S. at 225-226:

The statute [Sec. 2283] is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States, which seeks to prevent threatened irreparable injury to a national interest.

The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U. S. C. Section 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U. S. C. § 2283 alone. * * *

The "frustrations of superior federal interests" would result not only from the denial of the right for the NLRB to utilize the federal courts to ensure uniform application of the NLRA rather than potentially conflicting, disparate rulings on protected picketing from state to state, but also from the inordinate delays evident in picketing cases processed through state appellate processes.

CONCLUSION.

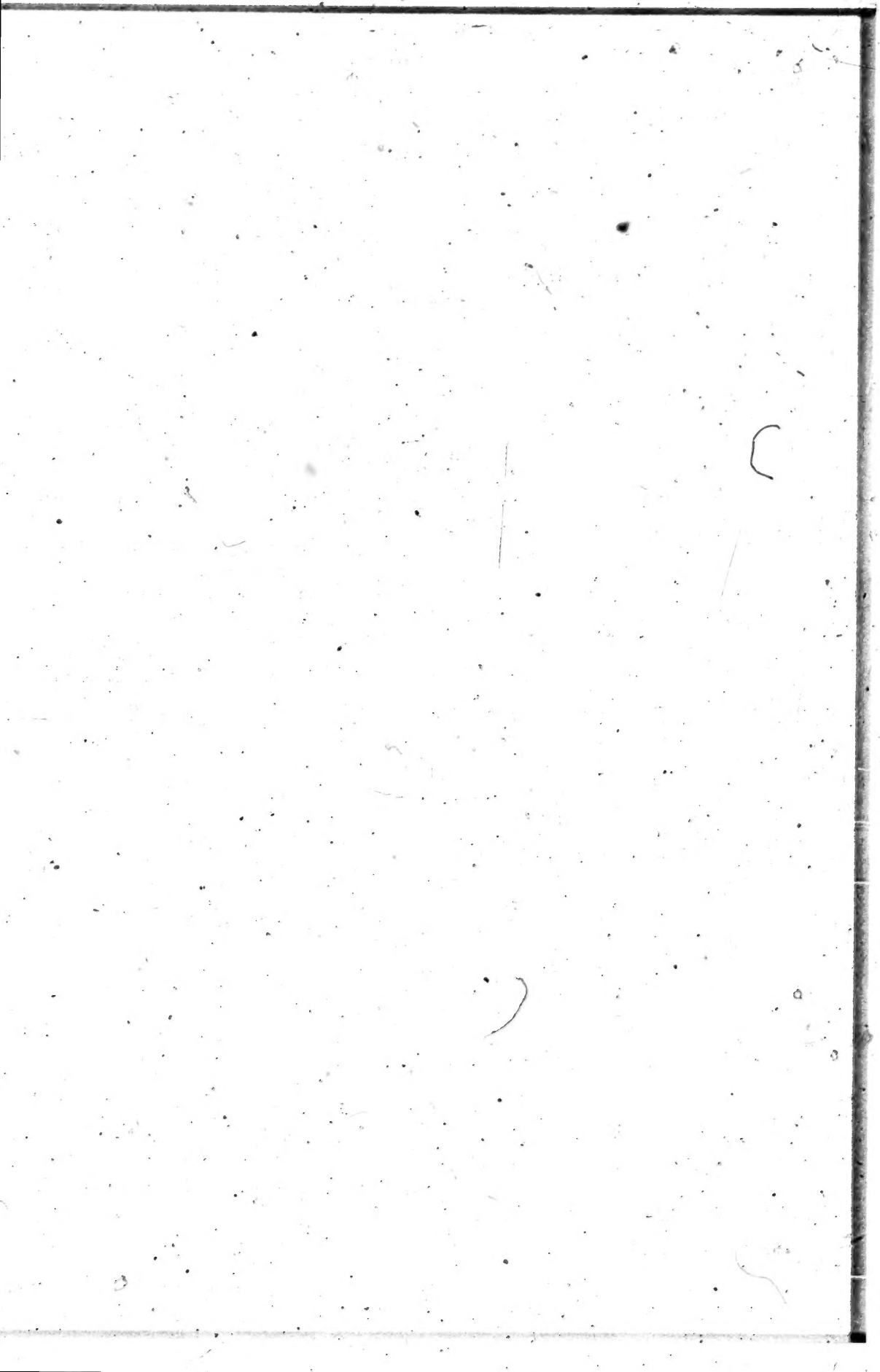
For the foregoing reasons, as well as those set out by the Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1420

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NASH-FINCH COMPANY, d/b/a JACK AND JILL STORES

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

OPINIONS BELOW

The opinion of the court of appeals (A. 54-63) is reported at 434 F. 2d 971. The memorandum and order of the district court (A. 44-51) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1970 (A. 64). The petition for a writ of certiorari was filed on March 2, 1971, and granted on April 26, 1971 (A. 65). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an agency of the United States is within the governmental exception to the statute which ordinarily prohibits federal courts from enjoining state court proceedings, 28 U.S.C. 2283, so that the National Labor Relations Board may, through proceedings in a federal court, enjoin the implementation of a state court order which regulates peaceful picketing governed exclusively by the National Labor Relations Act.

STATUTES INVOLVED

28 U.S.C. 2283 provides as follows:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Also relevant are portions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) and of the Nebraska anti-picketing statute (Secs. 28-812, *et seq.*, R.S. Neb. 1964), which are set out in the Appendix, *infra*, pp. 39-43.

STATEMENT

A. The Underlying Facts

In August 1968, District Union 271, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, began an organizing campaign among the meat department employees of the Jack and Jill

("Company") stores in Grand Island, Nebraska (A. 55; 10). In October 1968, the Union filed unfair labor practice charges against the Company alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5). The Board's General Counsel issued a complaint based on the charges (A. 55; 9). In April 1969, after hearing, the Trial Examiner sustained the complaint, finding that the Company had violated the aforementioned provisions of the Act by refusing to bargain with the Union, and by suggesting "the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation" (A. 56; 22). The Trial Examiner recommended that the Company be ordered to cease and desist from the unfair labor practices found and from any like or related conduct, and to bargain with the Union (A. 56; 23).

Approximately one month after issuance of the Trial Examiner's decision, the Union began picketing the Company's stores with signs advising the public that the Union was striking in protest against the Company's unfair labor practices (A. 56; 27, 28). The Union also distributed handbills to passers-by which stated, in part, that the Company had refused to bargain "or comply with other findings and recommendations of a trial examiner of the National Labor Relations Board", and urged members of the

public not to shop at the Company's stores (A. 56; 28, 30).

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for an injunction against the Union, its officers, and certain individual pickets (A. 56-57; 27-30). The petition alleged that the Union was engaging in "mass picketing," in violation of Nebraska law, by picketing with more than two pickets within 50 feet of each other and by blocking entry to and exit from the stores; that, insofar as the signs and handbills represented that a strike existed and that the Company was engaged in unfair labor practice activity, they were false and malicious in further violation of state law; and that the pickets had threatened customers with property loss, had used profane and vulgar language, and had slandered the Company's business reputation (A. 57; 27-28).

The state court issued a temporary restraining order, and then, overruling the Union's motion to vacate, a temporary injunction (A. 57; 31, 7-8). The injunction, which remains in effect, limits pickets to two at each of the Company's stores, and enjoins them from blocking or picketing entrances or exits to the store, and from distributing handbills or literature pertaining to the dispute in any manner which would halt or slow the movement of traffic (A. 7). The injunction also bars (1) anyone other than a bona fide member of the Union from picketing unless that person first submits himself to the jurisdiction of the state court by becoming a defendant in the proceedings; (2) pickets from instigating con-

versations with the Company's customers in any manner relating to the dispute; (3) pickets from "[d]oing any act in violation of Sections 28-812, 28-814.01 and 28.814.02 R.S. Neb. 1964;"¹ and (4) anyone, other than pickets or named defendants, from picketing, distributing handbills, or otherwise "caus[ing] to be published or broadcast any information pertaining to the dispute * * * between the parties" (A. 7-8).

In September 1969, several months after this injunction was obtained, the Board announced its decision accepting in part and rejecting in part the Trial Examiner's recommendations.²

B. The Federal Court Proceedings

On August 29, 1969, the Board filed suit in the federal district court in Nebraska for an injunction to restrain the Company from enforcing the provisions of the state court injunction described in (1) to (4), *supra*, on the ground that they regulated conduct which was governed exclusively by the National Labor Relations Act (A. 57; 4-6). The district court denied the Board's motion for a preliminary injunction and granted the Company's motion to dis-

¹ These provisions are discussed, *infra*, pp. 34-35, n. 16.

² The Board sustained the Examiner's Section 8(a)(1) findings and his remedy therefor, but rejected his findings of an unlawful refusal to bargain and the Examiner's recommended bargaining order. Respecting the latter, the Board found the Union's showing of majority status deficient. 178 NLRB No. 77, 72 LRRM 1144. The Company subsequently complied with the Board's decision.

miss the complaint. Although noting that the Union's picketing "may be within the exclusive jurisdiction of the N.L.R.B.," it concluded that it did not "have the power by virtue of the limitations imposed upon it by [28 U.S.C.] section 2283 to issue the [Board's] requested relief" (A. 47, 50). Section 2283, in general, prohibits federal courts from interfering with State court proceedings. The district court rejected the Board's contention that it was within an exception to Section 2283, recognized in *Leiter Minerals v. United States*, 352 U.S. 220, for suits brought by the United States (A. 45-46).

The Eighth Circuit affirmed (A. 54-63). Although recognizing "that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings," the court adhered to an earlier holding, *National Labor Relations Board v. Swift & Co.*, 233 F. 2d 226, 232, that, "for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States" (A. 58, 59). Since the Board could not avoid the prohibitions of Section 2283 on the basis of any of its other exceptions, an injunction against the state court proceeding was barred (A. 59-63).

SUMMARY OF ARGUMENT

I.

Although 28 U.S.C. 2283 generally prohibits district courts from granting an injunction to stay

proceedings in a state court, the history and interpretation of that provision make clear that it does not apply to suits brought by the United States or its agencies. Section 2283 is only the most recent statement of a principle which has been embodied in the law since the first Judiciary Act. That principle was adopted to reduce the occasions for conflict and friction within a dual court system, and to avoid affording litigants the unqualified right to have state court judgments reviewed in federal district courts. For the federal government and its agencies, on the other hand, federal courts are the natural, if not the exclusive forum, it promotes healthy federal-state relations if they have access to federal courts to enforce paramount federal rights.

Accordingly, judicial interpretation of Section 2283 and its predecessors has developed along two lines. Where private parties have sought federal court injunctions interfering with state court action, this Court, since *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, has been insistent that any opportunity to obtain such relief is narrowly circumscribed by the statutory exceptions. See also *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511; *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281; *Younger v. Harris*, 401 U.S. 37. On the other hand, where injunctive relief was sought by federal governmental authority to enforce its statutory mandate, such suits have uniformly been entertained, whether or not there was a specific statutory provision for them. *E.g.*, *Bowles v. Willingham*, 321 U.S. 503; *Capital Service*,

Inc. v. National Labor Relations Board, 347 U.S. 501; *Leiter Minerals, Inc. v. United States*, 352 U.S. 220. In the words of a court of appeals which faced the issues before Section 2283 was enacted:

[W]e do not think that section may properly be construed as forbidding the granting of an injunction to restrain interference by state courts with the enforcement of a federal statute by an agency to which Congress has delegated exclusive power to enforce it. The purpose of that section was to avoid unseemly conflict between the state and federal courts in ordinary litigation between private litigants, not to hamstring the federal government in the use of its own courts in the protection of its rights or the enforcement of its laws. * * * [*Brown v. Wright*, 137 F. 2d 484, 488 (C.A. 4).]

Nothing in the enactment of Section 2283 suggests any purpose to eliminate this well-established exception to the anti-injunction rule. Indeed, the opinion which was the principal reliance of the court below, *Amalgamated Clothing Workers, supra*, is careful to set out that the relief in that case was sought by private, not public, parties. Private litigants who assert the public interest may often do so for their own private purpose. To permit federal courts to interfere with state court proceedings at the behest of any interested party not only threatens to multiply court proceedings but also adds

an element of federal-state competition * * * which may be trusted to be exploited and to complicate, not simplify, existing difficulties [348 U.S. at 519.]

But, for the federal government and its agencies, use of the federal courts is "preferable in the context of healthy federal-state relations." *Leiter Minerals, Inc., supra*, 352 U.S. at 226. When a federal agency invokes injunctive relief, it presents not only an abstract issue of preemption or public policy, but also its own judgment, which is entitled to weight, that in this particular case that issue requires public intervention. That judgment is subject to review, on its merits, but is not foreclosed by Section 2283.

II.

Section 2283 is the only possible barrier to a hearing of the claim for injunctive relief in this case. Since Congress has given the Labor Board exclusive jurisdiction over the subject matter and the intrusion of the state injunction in this case would result in a conflict of functions, the Board's authority to seek an injunction in federal court must be implied, in the absence of any congressional command to the contrary. Such enforcement powers have been implied by this Court in the past. *Capital Service, Inc. v. National Labor Relations Board, supra*; *Bowles v. Willingham, supra*. Congress has not made an express grant of authority to the Board for every legal proceeding that may be required in its administration of the Act. Authority to bring suits to carry out or protect statutory policy has been implied with respect to several federal regulatory agencies.

The district court's jurisdiction was properly invoked, 28 U.S.C. 1337, and the Board's complaint is supported by a justiciable interest on its part in re-

moving an unlawful obstacle to the fulfillment of its obligations under the National Labor Relations Act. The supremacy of that Act could be substantially impaired if the Board were unable to check encroachments on its exclusive jurisdiction, as it has sought to do here. The only proper issue is whether the Board has successfully made out a case for injunctive relief in the particular circumstances of this case; that issue was never reached below, since the Court found in Section 2283 an absolute barrier to the provision of such relief. The case should be reversed and remanded for consideration of the Board's request on the merits.

ARGUMENT

- I. THE BAN IMPOSED BY 28 U.S.C. 2283 AGAINST ENJOINING STATE COURT PROCEEDINGS IS INAPPLICABLE TO SUITS BROUGHT BY AN AGENCY OF THE UNITED STATES TO RESTRAIN STATE COURT PROCEEDINGS HARMFUL TO A NATIONAL POLICY ADMINISTERED BY THAT AGENCY.

Section 2283 of the Judicial Code prohibits a United States court from granting

an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Though this language is broad, this Court has determined that it does not apply to suits by the United States to restrain state court action which threatens "irreparable injury to a national interest," *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225-

226, even though such suits may not fall within one of the stated exceptions to the Section. Section 2283 is a revision of earlier provisions of federal law which had been authoritatively interpreted to allow such federal injunctions. *E.g.*, *Bowles v. Willingham*, 321 U.S. 503. In *Leiter*, the Court ruled that

The frustration of superior federal interests which would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. * * * [352 U.S. at 226.]

Similarly severe frustration of federal interests would ensue from precluding agencies of the United States from obtaining stays of state court proceedings impinging on matters subject to their authority, as the state court proceedings did with respect to the Labor Board's authority here; and so the purpose to permit such frustration, too, cannot be imputed to Congress from the general language of Section 2283 alone.

A. *Prior to the enactment of Section 2283, its predecessors permitted suit by any federal authority seeking to enjoin state court action interfering with federal interests.*

As this Court has made clear as recently as last Term, Section 2283 is merely the most recent statement of a principle which has restricted the authority of the federal judiciary since the nation's birth. *Younger v. Harris*, 401 U.S. 37, 43-44; see also *At-*

lantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 282-283, 285-287. As these opinions show, the principle was enacted into law to reduce the opportunities for "conflicts and frictions" in our unique dual court system by restraining litigants with a choice of forum from trying to provoke the federal and state courts into wasteful battles over the control of particular cases. *Id.* at 286. For most litigants, the federal courts are an unusual or alternative forum, the more remote of the two essentially separate legal systems available to them; it is important to assure that that forum is not used to frustrate the course of justice in state courts equally available to them.

For the federal government and its agencies, however, the federal court system is the system of usual, if not exclusive, jurisdiction; in the ordinary course, they may be sued, if at all, only there,³ and federal

³ Indeed, actions against the National Labor Relations Board have been dismissed on the ground that the suit is against the United States which cannot be sued without the consent of Congress. *Clover Fork Coal Co. v. National Labor Relations Board*, 107 F. 2d 1009 (C.A. 6); *Biggs v. National Labor Relations Board*, 38 LRRM 2728 (N.D. Ill.). So have suits against similar agencies of the federal government: *Blackmar v. Guerre*, 342 U.S. 512, 515 (War Assets Administration); *Simons v. Vinson*, 394 F. 2d 732, 736 (C.A. 5) (Department of Interior and Bureaus of Land Management and Indian Affairs); *Cotter Corp. v. Seaborg*, 370 F. 2d 686, 691-692 (C.A. 10) (Atomic Energy Commission); *Soderman v. United States Civil Service Commission*, 313 F. 2d 694, 695 (C.A. 9), certiorari denied, 372 U.S. 968 (Civil Service Commission); *Evans v. United States Veterans Administration Hospital*, 391 F. 2d 261, 262 (C.A. 2) (Veterans Administra-

courts are expressly given jurisdiction over all suits brought by the United States and by its agencies which have authority to sue. 28 U.S.C. 1345. In recognition of this distinction in posture, and of the rather different considerations of federalism which apply when the national government or its agencies sue, as we show within, it was uniformly held that the predecessors of Section 2283 did not prohibit suits by federal authorities seeking to stay or enjoin state court action interfering with federal interests.

The recent insistence on a strict adherence to the provisions of Section 2283 first appeared in Mr. Justice Frankfurter's opinion for the Court in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, a case in which a federal injunction was sought to stay state court proceedings being conducted in alleged disregard of a prior federal court adjudication of the dispute between the parties. *Toucey* discusses at great length the legislative and judicial history of what was then Section 265 of the Judicial Code. Significantly for this case, *Toucey* was an action entirely between private litigants and, indeed, it appears that each of the cases cited and discussed in the opinion may be similarly characterized. The exception to Section 265 for federal injunctions sought by the United States had been recognized and discussed in an article on which considerable reliance was placed in *Toucey*.

tion); *Holmes v. Eddy*, 341 F. 2d 477, 479 (C.A. 4) (Securities and Exchange Commission).

See also *Gala-Mt. Arts, Inc. v. Laiben*, 37 LRRM 2134 (E.D. Mo.) (Board Regional Director entitled to governmental immunity against suits for damages for acts performed in the course of official duties).

Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale L. J. 1169, 1192-1194 (1933); see 314 U.S. at 131, 133.⁴ Yet the exception was nowhere discussed in the opinion.

Whether there was an exception for injunctions sought from a federal court by an agency of the United States to stay state court proceedings threatening interference with federal policy became a subject for dispute almost immediately after *Toucey* was decided, in connection with the Emergency Price Control Act of 1942. In *Brown v. Wright*, 137 F. 2d 484 (C.A. 4), the Administrator of the Office of Price Administration sought to enjoin a landlord's use of state court eviction proceedings to enforce allegedly excessive rents. Judge Parker, for the court, found, first, that the Administrator had no obligation to submit or become a party to the state court proceedings. Turning to the question of Section 265, he held (p. 488):

[W]e do not think that section may properly be construed as forbidding the granting of an injunction to restrain interference by state courts with the enforcement of a federal statute by an agency to which Congress has delegated exclusive power to enforce it. The purpose of that section was to avoid unseemly conflict between the state and federal courts in ordinary litigation between private litigants, not to hamstring the federal government in the use of its own

⁴The article states the authors' considerable debt to Professor Frankfurter, as he then was. 42 Yale L.J. 1169 n. *.

courts in the protection of its rights or the enforcement of its laws. The statute * * * should have no application to injunctions issued to protect property of the federal government or the exercise of power which Congress has delegated exclusively to a federal agency. See *United States v. McIntosh*, D.C., 57 F. 2d 573. It is a matter of necessity, as well as of constitutional declaration, that the Constitution of the United States and laws passed pursuant thereto be the supreme law of the land; and it was never the intention of Congress, we think, that the power of the federal government to enforce its laws in its own courts should be limited with respect to the use of injunctions. * * *

* * * If the Administrator were denied injunctive relief from threatened violation because of the pendency of state court proceedings and were required to intervene in such proceedings for relief, resulting delays might well render the act nugatory in states not in sympathy with the legislation. The federal government is not so impotent that it must depend upon instrumentalities of the states for the enforcement of legislation so vital; and it is not to be presumed that a general statute limiting the power of federal courts to issue injunctions was intended to apply to such cases. * * * [137 F. 2d at 488.]

Other lower federal courts reached similar conclusions in other cases brought by the government or one or another of its agencies to enforce public policy.⁵ *E.g.*, *Okin v. Securities and Exchange*

⁵ No exception exists where the government is asserting an essentially private right. Such was the situation in *United States v. Parkhurst-Davis Co.*, 176 U.S. 317, a very brief

Commission, 161 F. 2d 978, 980 (C.A. 2); *Bowles v. Hayes*, 155 F. 2d 351, 355 (C.A. 3); *Henderson v. Fleckinger*, 136 F. 2d 381 (C.A. 5); *Western Fruit Growers v. United States*, 124 F. 2d 381 (C.A. 9); *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9); *In re Securities and Exchange Commission*, 48 F. Supp. 716 (D.Del.). Neither Section 265 nor its restrictive interpretation in *Toucey* was found to foreclose such relief, since the considerations of federalism and of preventing private forum-shopping simply did not apply.

This Court in effect endorsed this line of reasoning two Terms after its *Toucey* decision, in *Bowles v. Willingham*, 321 U.S. 503, 510-511. That case also arose under the Emergency Price Control Act of 1942. Although that Act authorized a variety of proceedings for injunction to restrain violations of the Act, and vested a designated special federal court with exclusive jurisdiction over actions against federal authorities under the Act, it nowhere expressly stated that federal authorities could seek injunctive relief against state court proceedings. Any such exception to Section 265 would have to be implied. And

opinion which turned on the government's concession for the first time in this Court that certain Indian lands were within state, not federal, jurisdiction; that the government had no "public" interest in the case; and that the Indians on whose behalf it was suing would be able to defend on their own behalf in the state action sought to be enjoined. *Taylor & Willis, op. cit. supra*, 42 Yale L.J. at 1183; *United States v. Inaba*, 291 Fed. 416, 417 (E.D. Wash).

as the Fourth Circuit had done in *Brown v. Wright*, *supra*, this Court implied the exception:

We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118. In that case we listed the few Acts of Congress passed since its first enactment in 1793 which operate as *implied legislative amendments* to it. 314 U.S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. * * * [By creation of a special federal court of exclusive jurisdiction,] Congress * * * preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts. The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey v. New York Life Ins. Co.*, *supra*) thus does not come into play. [321 U.S. at 510-511; emphasis added.]⁶

⁶ In *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, a suit between private parties which we discuss *infra*, pp. 20-21, 26-28, the Court denied that this passage stood for the proposition that there was a general exception to Section 265 in areas of regulation preempted by Congress. 348 U.S. at 515, n. 2. We accept that interpretation since our argument is only that the Board as federal administrator of the preempted subject—not any private party—may seek injunctive relief against state court action. It is clear, however, contrary to an implication in the *Richman Brothers* opinion, *ibid.*, that the Emergency Price Control Act stated no express exception to the rule of Section 265. Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 739 (1961). That exception had to be “implied,” 321 U.S. at 510, and was implied, in part, on the basis that the existence of a preempted area made it essential that the

B. Neither Section 2283 nor its subsequent interpretation prohibits suits by federal authorities seeking to enjoin state court action interfering with federal interests.

Section 2283 was enacted as part of the overall consolidation and revision of the Judicial Code in 1948. It is essentially a continuation of the prior law, as this Court has repeatedly recognized. *Younger v. Harris, supra*; *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, supra*. Although it embodies a more precise statement of the exceptions to the anti-injunction rule than the prior statutes, no suggestion may be found in the Reviser's Notes or its other legislative history that it was intended to have any effect on the previously recognized exception for injunctions on behalf of federal officials enforcing federal policies. Cf. H. Rep. No. 308, 80th Cong., 1st Sess., A 181-A 182; Moore, *Commentary on the U.S. Judicial Code*, 396-397 (1949). Given the sweeping nature of the revision of the Judicial Code of which Section 2283 was a part, and the importance to the federal government and its agencies of the power reflected in the opinions cited above, an intent to change the prior law could not be lightly assumed. See *National Labor Relations Board v. New York State Labor Relations Board*, 106 F. Supp. 749 (S.D.N.Y.).

Section 2283 was before this Court on three occasions over a short span of years in the early 1950's.

federal authority charged with administering the area be able to enforce the exclusive nature of the remedies Congress had provided.

The first of these cases was *Capital Service, Inc. v. National Labor Relations Board*, 347 U.S. 501; it involved a question closely related to that raised here. An employer had there invoked both a state court and the Labor Board against union picketing which included both secondary boycott and protected activity. The Board's Regional Director sought a federal court injunction against the prohibited secondary activity, pursuant to Section 10(1) of the Labor Act, 29 U.S.C. 160(1), and at the same time sought to enjoin the employer from enforcing the injunction he had obtained from the state court—an injunction which forbade protected as well as unlawful picketing. The latter injunction was challenged in this Court as contrary to Section 2283. This Court concluded that the injunction was necessary in aid of the district court's jurisdiction under Section 10(1), and thus did not have to reach the question whether it would have been proper otherwise.⁷ The Court did make clear, however, that Section 2283 was the only possible barrier to the relief sought:

⁷ The Court's construction of the "necessary in aid" language of Section 2283 was a broad one. As is the case here, the basis for objection to the state court injunction was that it prohibited activity which the federal labor laws permitted, not that it duplicated relief which Section 10(1) permitted federal courts to give. It may be doubted whether the Board would ever have sought to suspend a state court injunction limited to secondary or violent activity; no such relief was sought in the present case. Since Section 10(1), as such, gave the district court authority only to enjoin secondary behavior, the conclusion that it was "necessary" to this jurisdiction for it to be able to interfere with orders prohibiting protected primary behavior was a generous one.

In absence of a command of the Congress to the contrary, the power of the District Court to issue the injunction is clear. Federal courts seek to avoid needless conflict with state agencies and withhold relief by way of injunction where state remedies are available and adequate. See *Alabama Commission v. Southern R. Co.*, 341 U.S. 341. But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. * * * [347 U.S. at 504.]

The next case was *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511. In this case, too, an employer obtained an anti-picketing injunction from a state court, although in this instance it seems to have been assumed that the picketing in question constituted an unfair labor practice rather than protected activity. Here, however, it was not the Board but the union which sought to have a federal court require the state court to lift its injunction. The union was a party in the state court proceedings, albeit the injunction there—because it was temporary—was not appealable under state practice. On this basis, the lower court had distinguished the cases in which the Board itself had sought such relief, and held that Section 2283 barred any private party from obtaining an order requiring the state courts to lift anti-labor injunctions. 211 F.2d 449 (C.A. 6).

On writ of certiorari in this Court, the argument focused on the private nature of the relief sought. No. 173, O.T., 1954, Pet. Br. 23-25; Memorandum for the National Labor Relations Board as *amicus curiae*, 7-11; Resp. Br. 13, 16-17. The Court specifically limited its statement of the question considered to whether such relief could be obtained "at the request of one of the private parties." 348 U.S. at 514. That limitation permitted it to state, as it otherwise could not have stated, *supra* pp. 14-16, that "no * * * exception [for such orders] had been established by judicial decision under former § 265." 348 U.S. at 515. For the exception in favor of the federal government and federal agencies had been called to the Court's attention in the briefs, *supra*, and indeed had been recognized in a recent decision in which the author of many of these opinions, Mr. Justice Frankfurter, had participated as Circuit Justice. *International Union of Electrical, Radio and Machine Workers v. Underwood Corp.*, 219 F.2d 100, 101-103; NLRB Mem. *supra*, at 7-8. The federal exception was not discussed as such in *Amalgamated Clothing Workers*; but the Court repeatedly stated, in effect, that any authority to secure injunctive relief was "vested in the Board and not in private parties." 348 U.S. at 517, 520.

The third of this series of opinions, also written by Mr. Justice Frankfurter, and in this case for a unanimous Court,^{*} was *Leiter Minerals, supra*. It

^{*} The decision in *Amalgamated Clothing Workers* commanded the votes only of Justices Frankfurter, Reed, Burton, Clark and Minton; Chief Justice Warren and Justices Black and Douglas dissented; Justice Harlan took no part in the decision.

addressed the question which had been left open in *Capital Service, Inc.* and *Amalgamated Clothing Workers, supra*, and held that an exception to Section 2283 would be implied where the injunctive relief against state court action was sought by public authority. The state court action in that case had been brought by Leiter Minerals against a mineral lessee of government land, claiming that Leiter Minerals in fact was the owner of the mineral rights to the land. The United States, the owner of the land, was not a party to this action; it instituted a quiet title action in the federal district court and sought to enjoin continued prosecution of the state court proceedings. As it had in *Capital Service*, the Court found "no doubt, apart from the restrictions of 28 U.S.C. § 2283, of the right of the United States to enjoin state court proceedings whenever the prerequisites for relief by way of injunction be present." 352 U.S. at 225.

Turning to Section 2283, the Court invoked as a rule of construction the principle that

statutes which in general terms divest pre-existing rights or privileges [that is, rights that would exist apart from the statute,] will not be applied to the sovereign without express words to that effect. [352 U.S. at 224, 225.]⁹

The Court found neither legislative history nor policy bases for subjecting the federal government to the

⁹ It previously had relied on this rule in *United States v. United Mine Workers*, 330 U.S. 258, 272; and Justice Frankfurter's proteges had earlier invoked the same rule to explain the federal exception to Section 265. *Taylor & Willis, op. cit. supra*; 42 Yale L.J. at 1193-1194.

restrictions of Section 2283. It found just the contrary, that there was

a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. * * * [T]he interpretation excluding the United States from the coverage of the statute seems to us preferable in the context of healthy federal-state relations. [352 U.S. at 225-226.]

This portion of the opinion is not at all dependent on the particular facts of the case. The government was in the position of an indispensable, but unavailable, party defendant in the state case, and the Court might have limited its interpretation of Section 2283 to such circumstances. That consideration is discussed, however, only in deciding whether the government had established its right to the injunctive relief which, it had now been decided, Section 2283

did not disable the federal court from affording it. 352 U.S. 226-228. Similarly, as the court below observed, A. 57, n.3, whether federal injunctive relief would be appropriate in the present case, assuming it could be granted, is an issue which has not yet been reached. What is at issue now is the power of the district court to grant such relief, and under *Leiter Minerals* that issue does not depend upon the type of federal interest which the government asserts. "It is * * * difficult to see how the nature of the interests the United States asserts can make a difference so long as the United States asserts them. * * * We are unaware that Congress even considered the applicability of section 2283 to the United States, much less that it distinguished between the type of rights the United States may happen to assert." *United States v. Wood*, 295 F. 2d 772, 779 (C.A. 5), certiorari denied, 369 U.S. 850.

Leiter Minerals, of course, concerned the United States, not a federal agency, and the decision below made this a governing consideration. Yet the cases recognizing the governmental exception under Section 265, including *Bowles v. Willingham*, *supra*, made no such distinction; the power to secure an injunction to protect important federal interests against incursion by state court action was found to be implicit in the broad mandate of enforcement given the federal administrator, as it is in the case of government itself. See also *National Labor Relations Board v. Roywood Corp.*, 429 F. 2d 964, 970 (C.A. 5); cf. *Federal Trade Commission v. St. Regis*

Paper Co., 304 F. 2d 731, 733-734 (C.A. 7).¹⁰ No reason suggests itself why an administrator of federal policy, who may bring suit in the name of the United States, such as the Administrator of the Federal Aviation Administration,¹¹ should be free of the restrictions of Section 2283, but the administrators of equally important federal policies who must sue in the name of an agency, such as the Labor Board, should be subject to those restrictions.

C. Section 2283 permits suits by federal officers to enjoin state court action in any case in which public, as distinct from private, right is being asserted.

We believe that the appropriate reconciliation of the principles stated in this Court's prior holdings is to find an exception in Section 2283 for any action brought by federal officers to vindicate a public, as distinct from a private, right. Cases permitting injunctions against state court actions, such as *Leiter*

¹⁰ In that case, the *St. Regis Paper Co.* had obtained an order in the state court restraining an accountant from producing information which the Commission had subpoenaed. The Commission applied for enforcement of its subpoena in federal district court, simultaneously seeking a stay of the state order. Such relief was found to be in aid of the district court's jurisdiction to enforce Commission subpoenas, but the conclusion rested essentially on the importance of the Commission's powers, and the interference with federal regulation which might occur if such relief could not be given; the Commission has no express statutory authority to seek such relief.

¹¹ In *United States v. City of New Haven*, Civ. No. 14264, D. Conn., the Federal Aviation Administration is seeking an injunction staying a state court injunction restricting the use of navigable air space. Cf. *American Airlines v. Town of Hempstead*, 398 F. 2d 369 (C.A. 2), certiorari denied, 393 U.S. 1017.

Minerals and United States v. Wood, *supra*, have emphasized the public aspect of the right sought to be vindicated;¹² the one case in this Court in which the United States was denied injunctive relief under Section 265 is readily characterized as one in which the government was asserting an essentially private claim. *United States v. Parkhurst-Davis Co.*, p. 15, n. 5 *supra*.

Amalgamated Clothing Workers presents no obstacle to such an analysis. It was strongly contended in that case that the policy of national preemption of state labor regulation, where applicable, was so strong as, in itself, to require an exception to Section 2283; it was asserted on behalf of the union in that case, that private litigants should be considered private attorney generals, in effect, empowered to assert that policy against the states through the federal courts. But private litigants who assert the public interest may often do so for their own private purpose. Cf. *L. Singer & Sons v. Union Pac. R. Co.*, 311 U.S. 295, 304. The necessity of invoking a federal court to interfere with state court proceedings is not

¹² *Wood* was a civil rights case in which the government sought an order enjoining state criminal proceedings on the ground that the prosecution in question, regardless of its outcome, would intimidate Negroes generally in the exercise of their right to vote in the state. In finding that Section 2283 did not bar this claim for relief, the court stressed that the government was not asserting the rights of the defendant—who it assumed would obtain a fair trial—but rather the rights of all Negro citizens of the area under the Civil Rights Act of 1957 to vote or register to vote without intimidation, threat, or coercion; these latter rights the Attorney General was directed by the statute to enforce. 295 F. 2d at 779-781.

established merely by the existence of a preemption doctrine; as the Court stated in its opinion, the line of demarcation between federal and state jurisdiction is "subtle" and the Court's statements regarding the area of exclusive federal jurisdiction are "hedged with qualifications." 348 U.S. at 519. In many cases, it will be appropriate to leave resolution of the issue to the state courts; to permit the federal courts to interfere at the behest of any interested private party not only threatens a possibly unnecessary multiplication of court proceedings, but also adds "an element of federal-state competition which may be trusted to be exploited and to complicate, not simplify, existing difficulties." *Ibid.*

These problems are avoided where the decision to seek injunctive relief is made by public authority. Where it is public authority which asserts the exclusiveness of a federal remedy or which puts forward views of federal policy, one has an assurance not otherwise possible that allegations of public policy are not being used to cloak delay or partisan advantage. For the federal government and its agencies, unlike private parties, the federal courts are the forum of choice;¹³ for them, as this Court recognized in *Leiter Minerals*, access to the federal courts is "preferable in the context of healthy federal-state relations." 352 U.S. at 226.

Moreover, a federal agency's invocation of injunctive relief on the ground of "frustration of superior

¹³ In cases where it supports the defense, as was true in *Leiter* and in this case, the federal authority could not be made a party in the state court action. See p. 12 and n. 3, *supra*.

federal interests," *ibid.*, automatically carries with it a certain definition of the federal interest which would be lacking in private litigation. That is, the fact that the federal agency has found it important to sue is *in itself* a determination of federal policy which—given the agency's mandate and expertise—is entitled to weight and respect. What is being asserted, as here, is not merely preemption or federal policy in the abstract, but also a concrete finding by the responsible officials of the importance of intervention in the particular case to protect "superior federal interests." In this case, for example, the Board acted to prevent state interference with labor activity which the federal act has designed to be free, and to foreclose an employer's evasion of the Board's exclusive jurisdiction over these activities, *infra* pp. 33-35. While the propriety of injunctive relief remains for the court to decide, as in *Leiter Minerals*, this added factor suffices to take the case outside *Amalgamated Clothing Workers*.

II. THE NATIONAL LABOR RELATIONS BOARD IS ENTITLED TO BE HEARD ON ITS APPLICATION FOR INJUNCTIVE RELIEF IN THIS CASE.

The cases discussed above make clear that Section 2283 is the only possible barrier to a hearing of the claim for injunctive relief. In *Capital Service*, the Court said that, "where Congress * * * has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal

right * * * [in the absence of a command of the Congress to the contrary]." 347 U.S. at 504. And in *Leiter Minerals*, as well, it found "no doubt, apart from the restrictions of 28 U.S.C. § 2283, of the right of the United States to enjoin state court proceedings whenever the prerequisites for relief by way of injunction be present." 352 U.S. at 225. If the governmental exception to Section 2283 extends to federal agencies such as the National Labor Relations Board, the Board is entitled to be heard on its claim.

Any contention apart from Section 2283 that the Board lacks authority or standing to bring this suit must fail. Although the only express statutory provision for Board authority to seek injunctive relief is that contained in Sections 10(j) and 10(l) of the Act, 29 U.S.C. 160(j), (l), to seek such relief against employers or unions after a charge of unfair labor practices has been made or a complaint has been issued,¹⁴ the Board's authority to enforce the exclu-

¹⁴ There was no means by which the Board could have linked its federal court suit against the state court proceeding to a suit under Section 10(l) or (j) of the Act. Section 10(l) provides that, upon the filing of a charge that a union has engaged in secondary boycott or picketing activity violative of Sections 8(b)(4) or 8(b)(7) of the Act, 29 U.S.C. 158(b)(4), (7), the Board's Regional Director, if he finds reasonable cause to believe that the charge is true, shall file a petition in a federal district court for an injunction against such activity pending a final adjudication by the Board. Section 10(j) provides similar authority in respect to other unfair labor practice conduct.

The Company did not file charges with the Board claiming that the Union's picketing violated Sections 8(b)(4) or 8(b)(7) of the Act, and, even if it had, the charges would undoubtedly have been dismissed, for the picketing, far from

sive nature of the federal scheme is readily implied. Indeed, the Court clearly took that step in *Capital Service, supra*, as it had in another context in *Bowles v. Willingham, supra*. In neither of those cases did the federal administrator have express authority to seek injunctive relief against preempted state action; yet, because "the intrusion of a state would result in conflict of functions," 347 U.S. at 504, the Court easily implied the authority to seek it "in order to preserve the federal right." *Ibid.*; see also, *United States v. Wood, supra*.

Congress has not made an express grant of authority for Board institution of, or participation in, every legal proceeding that may be required in the performance of its obligation to administer the Act. Cf. *Republic Aviation Corporation v. National Labor Relations Board*, 324 U.S. 793, 798. The absence of any such provision, however, has never been deemed to require that the Board's authority be narrowly confined to the precise judicial procedures described in the Act. On the contrary, where proper discharge of the Board's responsibilities under the Act cannot

violating those Sections, is privileged under the Act (n. 16, *infra*). Hence, there was no basis for seeking an injunction under Section 10(l) of the Act. Moreover, since the Board has held that an employer's resort to a court to enjoin activity protected by Section 7 does not violate Section 8(a)(1), 29 U.S.C. 158(a)(1), *Clyde Taylor*, 127 N.L.R.B. 103, 109, a charge against the Company for interfering with that activity would lie only if it had resorted to the "unsatisfactory remedy of using 'self-help,'" *Int'l Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 202 (concurring opinion of Mr. Justice White). Accordingly, there was likewise no basis for obtaining an injunction under Section 10(j).

be accomplished by resort solely to the statutory remedies expressly provided, the Act by implication authorizes the Board to seek other appropriate and traditional legal remedies in order to prevent frustration of the Act's purposes.¹⁵ See *e.g.*, *Nathanson v. National Labor Relations Board*, 344 U.S. 25 (power to appear in bankruptcy proceedings and file claims therein); *In re National Labor Relations Board*, 304 U.S. 486 (power to petition for writ of prohibition against premature invocation of court of appeals' reviewing jurisdiction); *Auto Workers v. O'Brien*, 339 U.S. 454 (power to appear in this Court as *amicus*, in state litigation involving subject matter preempted by the Act); *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (power to institute contempt proceedings for violation of decrees enforcing Board orders); *Home Beneficial Association v. National Labor Relations Board*, 172 F. 2d 62, 63 (C.A. 4), and *National Labor Relations Board v. Bird Machine Co.*, 174 F. 2d 404, 406 (C.A. 1) (power to conduct supplemental administra-

¹⁵ This principle has long been recognized as applicable both to the United States and its agencies in order to establish their capacity to bring suit, although not specifically authorized by statute, "for the purpose of protecting and enforcing * * * governmental rights and to aid in the execution of * * * governmental policies." *Griffin v. United States*, 168 F. 2d 457, 459-460 (C.A. 8). See *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 204; *United States v. California*, 332 U.S. 19, 26-29; *United States v. Minnesota*, 270 U.S. 181, 194; *Cotton v. United States*, 11 How. 229, 231; *West India Fruit & Steamship Co. v. Seatrain Lines*, 170 F. 2d 775, 779 (C.A. 2); *United States v. LeMay*, 322 F. 2d 100, 103 (C.A. 5).

tive proceedings after entry of enforcement decree); *National Labor Relations Board v. New York Labor Relations Board*, *supra* (power to seek injunction against state regulatory agency invading the Board's exclusive unfair labor practice jurisdiction); *National Labor Relations Board v. Industrial Commission of Utah*, 84 F. Supp. 593 (D. Utah), affirmed *per curiam*, 172 F. 2d 389 (C.A. 10) (power to seek injunction against state regulatory agency invading Board's exclusive jurisdiction to conduct representation proceedings); *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. 2d 757 (C.A. 9) (power to seek injunction to prevent attachment of back pay awards following enforcement of Board decree).

Similar implications have been made with respect to other federal regulatory agencies. The Federal Trade Commission, in view of its mandate to enforce the Clayton Act, has been held entitled to seek a stay of a merger pending its action, although no explicit authority for that remedy appears. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 605-612. The Securities and Exchange Commission, because of its "interest in the maintenance of its statutory authority and the performance of its public duties", has been held to have authority, although not expressly granted it, to intervene "to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it." *Securities and Exchange Commission v. United States Realty and Improvement Co.*, 310 U.S. 434, 460. The Wage and Hour Administrator's authority to apply to a federal district court for an injunction to en-

force an industry wage order has been upheld, even though the Fair Labor Standards Act does not expressly so provide, on the ground that such authority was essential "in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted." *Walling v. Brooklyn Braid Co.*, 152 F. 2d 938, 940-941 (C.A. 2). In sum, capacity in the United States or one of its agencies to seek the injunctive aid of a court of equity is implied, unless the applicable statutory provisions forbid, where such action is required "in removing unlawful obstacles to the fulfillment of its obligations." *United States v. Minnesota*, 270 U.S. 181, 194.

The district court's jurisdiction was properly invoked under 28 U.S.C. 1337, which confers jurisdiction in the district courts over all civil actions arising under federal legislation regulating commerce. And the Board's complaint is supported by a justiciable interest on its part in removing an unlawful obstacle to the fulfillment of Congress' objectives.

In enacting the National Labor^o Relations Act, Congress desired to "obtain uniform application of [the Act's] substantive rules and to avoid [those] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Union*, 346 U.S. 485, 490. Consequently, it "entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience * * *." *San Diego Bldg.*

Trades Council v. Garmon, 359 U.S. 236, 242; *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, No. 76, O.T., 1970, decided June 14, 1971, slip op. 12-14. The federal regulatory scheme operates by defining some activities to be "protected" and some practices to be prohibited, leaving other conduct to the free play of economic forces. "For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner, supra*, 346 U.S. at 499-500; see also *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260. The state court injunction here clearly impinged on an "area of labor combat designed to be free."¹⁶ Hence, in bringing suit to re-

¹⁶ The state's right to enjoin mass or violent picketing does not justify a ban on all picketing or other forms of peaceful concerted activity. See *Youngdahl v. Rainfair*, 335 U.S. 131, 139-140; *United Mine Workers v. Gibbs*, 383 U.S. 715, 729-735. The injunction here limits the picketing to bona-fide members of the Union, and then only to those who submit themselves to the jurisdiction of the state court; prohibits the pickets from "[i]nstigating conversations with [the Company's] customers in any matter relating to the dispute herein"; and bars persons other than qualifying pickets from causing "to be published or broadcast any information pertaining to the dispute between the parties hereto" (*supra*, pp. 4-5). These provisions restrict the exercise of peaceful concerted activity to a greater extent than does, and thus conflict with, the National Labor Relations Act. See *Hill v. Florida*, 325 U.S. 538; *Tyree v. Edwards*, 287 F. Supp. 589 (D.C. Alaska), affirmed, 393 U.S. 405; *Garner v. Teamsters Union, supra*, 346 U.S. at 499-500; *National Labor Relations Board v. Servette*, 377 U.S. 46; *National Labor Relations Board v. Fruit & Vegetable Packers*, 377 U.S. 58. Moreover, the state injunction also

move that impingement, the Board, no less than the Government in *Leiter*, was seeking to prevent "irreparable injury to a national interest" (352 U.S. at 225-226)—i.e., to protect the federal system of regulation which Congress has fashioned.

The supremacy of the Act in the field which it occupies could be readily impaired unless the Board were empowered to take appropriate legal steps to check encroachments on its exclusive jurisdiction. Thus, were the Board unable to seek elimination of such encroachments by a state court, their elimination would depend entirely upon such fortuitous factors as whether the defendant contested the state court action on the ground of federal supremacy, or whether the defendant had the desire and the funds to appeal the action to a higher state court, and, if need be, to this Court. Without power in the Board to take appropriate steps to vindicate the federal regulatory authority, an absence of any one of these factors would result in effective state interference with the Board's exclusive jurisdiction. The Board "as the representative of the public has an interest apart from that of the individuals affected." *Hopkins Federal Savings & Loan Ass'n v. Cleary*, 296 U.S. 315, 339-340; see also *National Labor Rela-*

enjoins the pickets from "[d]oing any act in violation of Sections 28-812, 28-814.01 and 23-814.02 R.S. Neb. 1964" (*supra*, p. 5). These provisions (App., *infra*, pp. 41-43) not only ban mass picketing and acts of physical coercion against persons desiring to work, but also "loitering about, picketing or patrolling the place of work * * * of such person * * * against the will of such person." The breadth of these provisions tends to chill the exercise of purely peaceful picketing. See *Thornhill v. Alabama*, 310 U.S. 88, 99-101, 104-105.

tions Board v. Roywood Corp., *supra*, 429 F. 2d at 970.¹⁷ There is no reason to suppose that Congress meant in this situation to depart from the basic purpose of entrusting "the vindication of the desired freedom of employees * * *, by reason of the recognized public interest, to the public agency the Act creates," and to permit a haphazard enforcement of the law in local tribunals by private litigants whose interests do not extend beyond their adversary status. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 266 see *United States v. Borden Co.*, 347 U.S. 514, 518-519.

There were only two means available by which the Board could eliminate the interference with activity preempted by the National Labor Relations Act which occurred here. It could have intervened in the state court suit, assuming such intervention would have been permitted, and sought, through appeal within the state court system and ultimately to this Court, to have the unlawful portion of the injunction vacated. This can be a time-consuming process, which, even if it ultimately resulted in a modification of the injunction, could not eliminate

¹⁷ It is this public interest which distinguishes this case from such cases as *Nathanson v. National Labor Relations Board*, *supra*, and *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U.S. 81, on which the court below relied. In *Nathanson*, this Court found, for the purposes of bankruptcy priority, that in presenting claims for back pay the Board was asserting essentially private rights (344 U.S. at 27-28); in *Reconstruction Finance Corp.*, the Court permitted costs to be taxed against the corporation, although it was an agency of government, because "its transactions are akin to those of private enterprises." 312 U.S. at 88.

the undue advantage in the labor dispute which the Company had obtained during the time the state injunction was operative.¹⁸ Or, the Board, as it did here, could have brought an independent federal court suit to nullify the force of the state court injunction. Authority for either step must be implied. Once it has been implied, for all the reasons stated above, Section 2283 poses no barrier to the second alternative if the Board finds that a preferable mode of proceeding.

¹⁸ As the district court here recognized (A. 50) :

It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is particularly relevant here where picketing activities are involved and * * * Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

See also *National Labor Relations Board v. Roywood Corp.*, *supra*, 429 F. 2d at 968.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to remand it to the district court for consideration on the merits of the injunction sought by the Board.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

SEC. 3. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. * * *

* * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. * * *

* * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such

cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such

charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period.

* * *

The relevant portions of the Nebraska anti-picketing statutes, Sections 28-812, 28-814.01 and 28-814.02 R.S. Neb. 1964 provide, as follows:

28-812. *Picketing, defined; unlawful.* It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, in-

decent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purposes; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the place of work or residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

* * * *

28-814.01. *Mass picketing; unlawful.* It shall be unlawful for any person, singly or in concert with others, to engage in or aid and abet any form of picketing activity that shall constitute mass picketing as defined in section 28-814.02.

28-814.02. *Mass picketing; definition display of sign required.* (1) Mass picketing means any

form of picketing in which there are more than two pickets at any one time within fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) Any person who shall legally picket by any means or methods other than forbidden in this section or in section 28-812 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be upper case lettering of not less than two and one half inches in height.

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In The
Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-93¹

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

V.

NASH-FINCH COMPANY d/b/a JACK & JILL
STORES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals in this case is reported at 434 F.2d 971 (8th Cir. 1970), and is set out in the Appendix in this case at pages 54-63. The Memorandum and Order of the District Court in this case are not officially reported, but are unofficially reported at 72 L.R.R.M. 2373 (D. Neb. 1969), and are set out in the Appendix at pages 44-51.

¹ This case was numbered 1420 in the October Term, 1970.

QUESTIONS PRESENTED

1. Whether or not the District Court correctly dismissed the complaint of the National Labor Relations Board seeking an injunction of the state court proceeding due to the limitations of 28 U.S.C. § 2283 (1965).

2. Whether or not the National Labor Relations Board stands in the same position as the United States in the instant case, thereby giving the District Court jurisdiction regardless of the limitations of 28 U.S.C. § 2283 (1965).

3. Whether or not this Court has the power to imply a specific exception to the limitations of 28 U.S.C. § 2283 (1965) to allow the National Labor Relations Board to seek injunctions of State Court proceedings in the area of labor relations from federal District Courts.

4. Whether or not the State Court Order, which regulates nonpeaceful picketing, has entered into a field that has been preempted by congressional legislation and governed exclusively by the National Labor Relations Act.

5. Whether or not the doctrine of federal preemption gives the District Court independent jurisdiction in this matter notwithstanding the fact that the National Labor Relations Board does not fit within any of the specified exceptions to the limitations of 28 U.S.C. § 2283 (1965).

6. Whether or not the desire to avoid needless friction between state and federal judicial systems and the desire to allow State Courts to proceed in an orderly manner without interference from Federal Courts is a superior federal interest to the interest of federal preemption asserted by the National Labor Relations Board in this case. •

STATEMENT

The Nash-Finch Company (hereinafter referred to as the Company or the Respondent) is a Delaware Corporation with headquarters in Minneapolis, Minnesota. The instant case deals with the Jack & Jill Food Stores operated by the Company in Grand Island, Nebraska. In August, 1968 the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), began an organizing campaign among the meat department employees of the Jack & Jill Food Stores of the Company in Grand Island. The Union demanded recognition based upon signed authorization cards in August and the Company, expressing a good faith doubt concerning the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board (hereinafter referred to as the Petitioner or the Board) for an election.

In October, 1968, the Union filed an unfair labor practice charge with the Board alleging that the Company was violating the National Labor Relations Act by refusing to bargain with the Union and by other conduct. A complaint was issued by the Board and the matter was set for hearing. In April, 1969, the Trial Examiner found that the Company had violated various portions of the Act (A.9-26).

The Board reversed the Trial Examiner in September, 1969 and concluded that the Company had not illegally refused to bargain with the Union for the reason that the Union had not represented a valid majority of the Company employees when the initial bargaining demand was made in August, 1968.² The

² See *Nash-Finch Company d/b/a Jack & Jill Stores*, 178 N.L.R.B. No. 77, 72 L.R.R.M. 1144 (1969).

Board did conclude that the Company had violated the Act by various other actions and it issued a cease and desist order regarding those violations.³ Subsequent to the Trial Examiner's decision, but prior to the issuance of the Board decision, the Union began picketing the Company's Grand Island, Nebraska stores and a number of other Company stores across the State of Nebraska. On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska (hereinafter referred to as the state court) for injunctive relief against this picketing. On May 28, 1969 the Honorable Donald H. Weaver issued a restraining order against the Union and set the matter for hearing on June 8, 1969 (A.31). On June 25, 1969, Judge Weaver issued a temporary injunction (A.7-8).

No charges concerning the picketing or the state court injunction have been filed by any party (A.48). However, on August 29, 1969, the Board filed a complaint in the United States District Court for the District of Nebraska, attempting to obtain an injunction against the state court injunction (A.4-6). On September 5, the Board moved the District Court for a preliminary injunction (A.33-34), and on September 8, the Union moved to intervene as a party plaintiff in the District Court action (A.36-41). Thereafter, the Company moved to dismiss the Board's complaint and filed objections to the Motion to Intervene (A.42-43).

On September 26, 1969 the Honorable Robert Van Pelt granted the Company's motion to dismiss and de-

³ Pursuant to the cease and desist order of the Board, notices were posted in the Company's Grand Island stores on September 26, 1969 for the sixty-consecutive days required by the Board's decision. It is uncontested that the Company has met compliance requirements for Case No. 17-CA-3697, but the case has not been closed due to a Board policy that a case should not be closed, even after compliance, if an injunction case is pending between the same parties.

nied the Union's Motion to Intervene (A.44-51). The Board (A.52) and the Union (A.53) filed notices of appeal to the United States Court of Appeals for the Eighth Circuit and the Circuit Court subsequently affirmed the ruling of the District Court (A.54-64). Thereafter, this Court granted certiorari (A.65).

SUMMARY OF ARGUMENT

This case does not involve peaceful picketing. Accordingly, the federal interest in allowing the State of Nebraska to exercise its police power to regulate non-peaceful picketing is controlling in the instant case rather than the federal interest of having the National Labor Relations Board preempt the regulation of peaceful picketing. The Nebraska Mass Picketing Statute and the injunction obtained in the state court constitute a proper exercise of the police powers reserved to the State of Nebraska. Strong public policy considerations and the specific congressional mandate of 28 U.S.C. § 2283 prohibit the injunctive relief against the state court proceedings sought by the National Labor Relations Board.

Even though the limitations of 28 U.S.C. § 2283 do not apply to actions brought by the United States to obtain injunctive relief of state court proceedings which threaten irreparable injury of federal interests, the National Labor Relations Board may not escape the limitations of 28 U.S.C. § 2283. Agencies of the federal government are not to be considered in the same position as the United States unless the Congress has specifically expressed an intent to provide the agency with such privileges and immunities. Since the Congress has not provided the National Labor Relations Board with the power to exercise the privileges and immunities of the United States, the limitations of 28 U.S.C. § 2283 may not be circumvented in the instant case.

The Nebraska Mass Picketing Statute at issue in this case is subject to attack only on the issue of federal preemption, as indicated by the specific wording of the "question presented" upon which certiorari was granted. Since the picketing in the instant case was not peaceful, the federal interest in reserving regulation of nonpeaceful picketing to the states under their police power prevails over the argument of federal preemption asserted by the National Labor Relations Board. Additionally, any argument of federal preemption is meaningless if initial jurisdiction has not attached, and due to the limitations of 28 U.S.C. § 2283, jurisdiction will not attach on the basis of federal preemption alone. The lower courts should be affirmed.

I.

ARGUMENT

The Circuit Court was correct in affirming the District Court's Dismissal of the Board's Complaint in this case due to both policy and statutory considerations.

At the outset, it must be noted that the instant case involves the very important question of the balance to be struck between national and state objectives in the field of labor relations. As a consequence, this case presents matters of a very basic legal and philosophical nature for resolution by this Court. However, no case may be determined upon legal theory alone without recourse to the specific factual setting in which the case reaches the Court, and it must be emphasized that the instant case *does not* involve peaceful picketing. Both the Board⁴ and the Union⁵ either have the impression, or are attempting to give the impression, that the picketing in the instant case was peaceful.

⁴ See Petitioner's brief at 34-35 n.16; see also Board's Petition at 2.

⁵ See brief for Union as amicus curiae at 2 and 7.

The only judicial determination in the instant case on the facts is the state court decision which determined that the picketing in this case constituted a violation of the Nebraska Mass Picketing Statute (A.7-8). Affidavits filed in the state court in support of the Company's Petition for a Temporary Restraining Order and Temporary Injunction indicate that the state statute was in fact violated. See Addendum A to this brief.^{5a} However, in addition to the violations of the Nebraska Mass Picketing Statute, the picketing in the instant case was punctuated by numerous bomb threats, substantial numbers of nails in several store parking lots, the pouring of kerosene over fresh meat in display cabinets, and considerable property damage, involving not only the Jack & Jill Stores in Grand Island, Nebraska but also at the Jack & Jill Stores in Lincoln, Beatrice, York, and Hastings; Nebraska. These various activities which accompanied the picketing in the instant case are evidenced by the official department records of the Grand Island, Nebraska Police Department,⁶ the Grand Island, Nebraska Fire Department⁷

^{5a} The Company submits that the Court may take judicial notice of these filings in the state court upon the authority of *Pennington v. Gibson*, 57 U.S. (16 How.) 65, 81 (1853); see also *Craemer v. Washington*, 168 U.S. 124, 129 (1897); *Zahn v. Transamerica Corp.*, 162 F.2d 36, 48 n.20 (3rd Cir. 1947); *United States v. Bleasby*, 257 F.2d 278 (3rd Cir. 1958); *Paul v. Dade County, Florida*, 419 F.2d 10, 12 (5th Cir. 1969); *St. Paul Fire & Marine Ins. Co. v. Cunningham*, 257 F.2d 731, 732 (9th Cir. 1958).

⁶ E.g., 1) Complaint Report No. 9058 (July 2, 1969) concerning a bomb threat at the Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska on that date.

2) Complaint Report No. 9122 (July 5, 1969) concerning a bomb threat at the Jack & Jill Store on South Locust Street in Grand Island, Nebraska on that date.

(3) Complaint Report No. 9538 (July 13, 1969) concerning an accident on property of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

the Lincoln, Nebraska Police Department⁸ the Bea-

4) Complaint Report No. 9841 (July 26, 1969) concerning vandalism to car at the Jack & Jill Store at South Locust Street.

5) Complaint Report No. 10394 (August 12, 1969) concerning window breakage in door of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska on that date.

6) Complaint Report 10936 (August 27, 1969) concerning bomb threat at Jack & Jill Store on South Locust Street on that date.

7) Complaint Report No. 10961 (August 28, 1969) concerning nails thrown in driveway of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

8) Complaint Report No. 11016 (August 29, 1969) concerning threat at Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

9) Complaint Report No. 11048 (August 30, 1969) concerning bomb threat at the Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

10) Complaint Report No. 11097 (September 1, 1969) concerning vandalism of phone booth in parking lot of Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska.

⁷ E.g., 1) Report No. 99 (July 2, 1969) bomb threat at Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska on that date. Store evacuated. False alarm.

2) Report No. 100 (July 5, 1969) bomb threat at Jack & Jill Store on South Locust street in Grand Island, Nebraska. Store evacuated. An M-80 firecracker actually exploded in the store causing damage to merchandise as store was being evacuated.

3) Report No. 7 (August 27, 1969) bomb threat at Jack & Jill Store on South Locust Street in Grand Island, Nebraska. False alarm.

4) Report No. 10 (August 29, 1969) bomb threat at Jack & Jill Store at Second and Broadwell in Grand Island, Nebraska. False alarm.

⁸ E.g., 1) Case No. G-1369 (July 5, 1969) concerning a bomb threat at the Jack & Jill Store at 70th and Vine Streets in Lincoln, Nebraska on that date and an actual explosion in the store on that date of some type of an explosive material.

2) Case No. G-1646 (July 7, 1969) involving a follow-up investigation of Case No. G-1369 after it was discovered that kerosene had been sprayed over meat on the meat counter at the Jack & Jill Store at 70th and Vine Streets in Lincoln. As a consequence, state meat inspectors condemned seventy packages of beef, steak, and beef roast; seventy-five packages of pork chops and steak sausage, and eleven packages of cheese, for a total loss of \$216.07.

trice, Nebraska Police Department,⁹ the Hastings Nebraska Police Department,¹⁰ the York, Nebraska Police Department,^{10a} and the Nebraska State Department of Agriculture,¹¹ of which the Company submits the Court may properly take judicial notice upon the authority of *New York Indians v. United States*, 170 U. S. 1, 32 (1898). See also *Muller v. Oregon*, 208 U. S. 412, 420-21 (1908); *Smith v. United States*, 353 F. 2d 838, 844 (D. C. Cir. 1965) cert. denied, 384 U. S. 974 (1966); *Rhodes v. Meyer*, 334 F. 2d 709 (8th Cir. 1964) cert.

3) Case No. G-3702 (July 21, 1969) involving the theft of five flags from the roof of the Jack & Jill Store at 70th and Vine in Lincoln. The flags were valued at \$5 each for a total loss of \$25.

⁹ See Case No. 25424 (May 26, 1969) concerning the dumping of kerosine in a meat cooler at the Jack & Jill Store in the Indian Hills Mall Shopping Center. Evidence of the dumping of kerosine in the meat cooler was discovered but no arrests were made.

¹⁰ E.g., 1) Report dated August 26, 1969 concerning bullet hole through window of Jack & Jill Store at 2416 West Second Street in Hastings, Nebraska. Police report indicated that occurrence "appears to be a part of the strike action that is taking place at all of the Jack & Jill Stores."

2) Report dated October 24, 1969, involving nails in driveway of two employees of the Company that continued to work for the Company during the picketing.

^{10a} See Report No. J-623 (July 5, 1969) concerning a bomb threat at the Jack & Jill Store in York, Nebraska.

¹¹ See, e.g., Special Inspection Report of Nebraska Department of Agriculture Bureau of Dairies and Foods dated May 26, 1969 involving the Jack & Jill Store at the Indian Hills Mall Shopping Center in Beatrice, Nebraska indicating that 152 packages of frozen and fresh meats, 45 packages of different frozen products, and 14 bags of different size flour were taken off sale and destroyed by the assistant store manager because the food products were adulterated by kerosine and the flour sacks were slashed by some unknown sharp object. See also a Bureau Special inspection report dated July 7, 1969 involving the Jack & Jill Store at 70th and Vine Streets in Lincoln, Nebraska in which 70 packages of fresh beef, 75 packages of fresh pork, and 11 packages of cheese were taken off sale and destroyed by store employees in the presence of state food inspectors because the merchandise had been spoiled by having kerosine poured onto the packages in a meat display counter.

denied, 379 U. S. 915 (1964); see generally, *Brown v. Piper*, 91 U. S. 37, 42 (1875); 9 *Wigmore, Evidence*, § 2568a (1940); *McCormick, Evidence*, § 325 (1954).

While it is true that most of the activity referred to in the foregoing departmental records was committed by a person or persons unknown, it is significant to note that the Company was harassed with such activities only during the time in which the Union conducted its picketing, supporting a very strong inference of causal connection.¹² In fact, at least one picket was made the subject of a complaint in Fremont, Nebraska for verbalizing the same type of attitude toward a Company customer that the previously described activity symbolized toward the Company.¹³

The Company submits that the unlawful activity accompanying the picketing in the instant case, if not providing this Court with an ample reason to conclude

¹² The "strong emotions" engendered by Company-Union disputes and the fact that violence makes strong demands on "calm judgment" during labor controversies has been recognized as obvious by this Court. See *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Milk Wagon Drivers Union Local 753 v. Meadowmoor Co.*, 312 U.S. 287, 296 (1941) rehearing denied 312 U.S. 715 (1941). The obvious connection between the Union-Company conflict and the fact that the Company received harassment of the type described previously was noted in a number of the police reports listed above. In urging the Court to conclude that there is a strong inference of a causal connection between the Union and the events of violence that punctuated the picketing in the instant case, the Company points to the following comment of Justice Frankfurter as being particularly applicable: "There comes a point where the Court should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949).

¹³ See *State v. James E. Brown* (August 25, 1969) before Justice of the Peace Daniel A. Martin involving a charge of disturbing the peace under NEB. REV. STAT. § 28-818 (Reissue 1964) by shouting an obscenity at a customer of the Company's warehouse in Fremont, Nebraska. Picket Brown was found guilty and fined \$31.00.

that the picketing was definitely nonpeaceful, at least precludes this Court from accepting the notion proposed by the Union and the Board that the picketing in the instant case was completely peaceful. See *Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 291-92 (1941) *rehearing denied*, 312 U. S. 715 (1941). The Company takes care to emphasize this point because the state police power interest is obviously paramount if the picketing was non-peaceful whereas the federal interest of preemption is arguably paramount if the picketing was peaceful. While agency considerations may hamper a determination on the part of the Court that the picketing was *prima facie* violent, the records to which the Company draws the Court's attention certainly preclude any conclusion that the picketing was altogether peaceful. See *Senn v. Tile Layers Union*, 301 U.S. 468, 479 (1937).

Due to the great importance of state police powers and due to the nature of the unlawful activity which surrounded the picketing in the instant case, the Company submits that a finding that the picketing was *not peaceful* would certainly be justified. However, should the Court view such a determination as improper in an appellate setting, the Company requests that the case be remanded to the District Court for findings of fact on this matter. Of course, if the District Court was correct in concluding that it did not have jurisdiction in any event, neither a factual determination by this Court nor a remand would be necessary regarding the entire picketing issue.

A. The District Court Was Correct in Denying the Request of the Board For an Injunction Against the State Court Proceedings on the Grounds of Public Policy.

A number of substantial policy considerations support the decision of the District Court in its denial of the Board's request for an injunction against the State

Court proceedings. In the first place, due to the historical independence of both state courts and federal courts, there is a long standing reluctance on the part of federal courts to interfere with state judicial proceedings. See *Diggs and Keith v. Wolcott*, 8 U. S. (4 Cranch) 179 (1807) (and cases cited therein at n.1); *United States v. Council of Keokuk*, 73 U. S. 6 Wall. 514, 517 (1867); see also *Hayes Industries, Inc. v. Caribbean Sales Associates, Inc.*, 387 F. 2d 498, 500 (1st Cir. 1968); *Joseph Baneroft & Sons Co. v. Shelley Knitting Mills, Inc.*, 374 F. 2d 28, 32 (3rd Cir. 1967); *Sheridan v. Garrison*, 415 F. 2d 699, 707 (5th Cir. 1969); *Slater v. Stoffel*, 411 F. 2d 653, 655 (7th Cir. 1969); *Lenske v. Sercomb*, 401 F. 2d 520, 521 (9th Cir. 1968).

This reluctance is quite understandable in light of the longstanding realization that all state courts retain their own sphere of authority,¹⁴ and the equally longstanding desire on the part of federal courts to avoid needless friction and conflict with state courts. See *Hale v. Bimco Trading Co., Inc.*, 306 U. S. 375, 378 (1939); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9 (1939); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 141 (1941); *Porter v. Dicken*, 328 U. S. 252, 254-55 (1946); *Elkins v. United States*, 364 U. S. 206, 221 (1960); *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 286 (1970).

Secondly, the request of the Board to the District Court for an injunction of the Nebraska State Court proceedings would have undermined one of the most basic powers of the state—the state police power. See *Mutual Loan Co. v. Martell*, 222 U. S. 225, 233 (1911);

¹⁴ See *Farrington v. Tennessee*, 95 U.S. (5 Otto) 679, 685 (1877); *Steward Machine Co. v. Davis*, 301 U.S. 548, 616 (1937) (dissenting opinion).

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U. S. 398, 434 (1934); *Louisville & Nashville R.R. Co. v. Central Stockyards Co.*, 212 U. S. 132, 150 (1909) (dissenting opinion). This is so for the reason that the Board would have had the District Court enjoin the State Court proceeding which had been brought under the Nebraska Mass Picketing Statute, which statute constituted an obvious and valid exercise of state police powers. See *U.A.W. v. Anderson*, 351 U. S. 959 (1956); *U.A.W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271-72 (1956); *Allen-Bradley v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942); *Youndahl v. Rainfair, Inc.*, 355 U. S. 131, 138-39 (1957); *U.A.W. v. Russell*, 356 U. S. 634, 640 (1958); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 386 (1969); *U.M.W. v. Gibbs*, 383 U. S. 715, 721 (1966); *Int'l Brotherhood of Teamsters v. Vogt, Inc.*, 354 U. S. 284, 293 (1957); *Milk Drivers v. Meadowmoor Dairies*, 312 U. S. 287, 301, 319 (1941).

Thirdly, and perhaps most importantly, the Company submits that a review of the practical effects of the position the Board urged upon the District Court, and now urges upon this Court, presents a strong policy reason for denying the Board the relief requested. The Respondent bases this contention upon a number of considerations. First, the Board is quite clearly attempting to deny private litigants the right to obtain injunctive relief in labor disputes and to reserve the right to obtain injunctive relief in such situations solely to the Board. See Petitioner's brief at 28-37. Such a position might be more easily understood if the Board was limiting its request to cases involving peaceful picketing.

However, as noted previously, there has been absolutely no judicial determination that the picketing in the instant case was peaceful and there are substantial

reasons for concluding that it was not. Therefore, the Board is apparently seeking to substantially undermine the police power reserved to the states in the field of labor relations as regards picketing. The Respondent submits that if there is any area in which the state police power is necessary, it is the area of labor relations; and that undermining the police power of states in any event is not in the best interests of public policy. Since the position urged upon this Court by the Board would effectively undermine the exercise of a significant and important police power by the State of Nebraska, the Respondent submits that the Board's position is clearly not in the best interests of public policy.

Another strong policy consideration against the Board's desire to amass unto itself the sole right to obtain injunctive relief in labor disputes and to deny that right to private litigants is found in the Board's recognized unwillingness to obtain injunctions in labor disputes. The Board already has the sole right, after the issuance of a complaint based upon a meritorious unfair labor practice charge, to obtain injunctive relief in a federal court under either Section 10(j) or 10(l) of the National Labor Relations Act. See *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U. S. 511, 520 (1955); see also Comment, *Développments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1050 (1965); Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961). However, the Board has been so reluctant to obtain injunctive relief at a time when the injunctive relief would do any good, at least for an employer, that this fact has been specifically noted and criticized by a subcommittee of the United States Senate. See STAFF ON SENATE COMM. ON THE JUDICIARY, 91st CONG., 1st SESS., SUBCOMM. REPORT ON SEPARATION OF POWERS 28 (Comm. Print 1970).

This issue was also recently raised in *Terminal Freight Handling Co. v. Solien*, — F. 2d —, 77 L.R.R.M. 2625 (8th Cir. 1971) in which the Circuit Court was presented with statistics indicating that the Board does not seek to obtain injunctions in 75 percent of the meritorious cases involving picket line situations. *Id.* at 2628-29 n.9. The Circuit Court noted that the statistics presented by the company in that case were also supported by the Board's 34th Annual Report which indicated that the Board sought injunctive relief in only 190 out of 784 meritorious cases, indicating that the Board failed to seek injunctive relief in 75.8 percent of the meritorious cases. See 34 N.L.R.B. ANNUAL REPORT, 199, 208, 238 (1969). The Respondent submits that the Board's failure to even seek injunctive relief in cases which are acknowledged to be meritorious is a clear indication that the additional power which the Board seeks will also not be used and that injunctions in labor disputes will, for all practical purposes, become a thing of the past.

Such a result is certainly not consistent with the purposes of the Act. See 29 U.S.C. § 151 (1965). In fact, since the Board has previously been accused of violating its obligation to enforce the terms and intent of the Act, the Respondent submits that the Board's efforts in this case to accumulate power in order to keep that power from being used by private litigants implies motivation for partisan, as distinguished from public, considerations. See STAFF ON SENATE COMM. ON THE JUDICIARY, 91st CONG., 1st SESS., SUBCOMM. REPORT ON SEPARATION OF POWERS (Comm. Print 1970). Of course, partisanship on the part of the Board is also not in keeping with the policies and purposes of the Act, the entire plan of constitutional government, or the best interests of the public. See *N.L.R.B. v. West Texas Utilities Co.*, 214 F. 2d 732, 740-41 (5th Cir.

1954); *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31, 47 (1942).

For all of the foregoing reasons, the Respondent respectfully submits that this Court should conclude that the action of the lower court in denying the Board's request for an injunction against the Nebraska State Court proceedings is consistent with public policy and that the position urged by the Board is significantly contrary to public policy.

B. The District Court Was Correct in Denying the Request of the Board For an Injunction Against the State Court Proceedings Due to the Specific Limitations of 28 U.S.C. § 2283 (1965).

In addition to the important policy considerations described above, the District Court was faced with a specific statutory prohibition against granting the relief sought by the Board. 28 U.S.C. § 2283 (1965) explicitly states that:

A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The District Court correctly referred to § 2283 as a "rigid limitation" on the power of that court to grant the relief sought by the Board and appropriately noted that the Board must clearly fall within one of the three stated exceptions within § 2283, as noted above, in order to obtain the relief sought (A.44-45): See *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U. S. 511, 514, 516, 518 (1955); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118 (1941); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281 (1970).

In passing on the import of § 2283 in a related context last year, this Court noted that:

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. *See Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers, supra* at 297.

The Board argued before both the District Court (A. 45, 50) and the Circuit Court (A.61-63) that it fell within the first statutory exception to the limitations of § 2283. The Board based this contention on the fact that an unfair labor practice complaint had issued against the Company in Case No. 17-CA-3697 and that this complaint thus authorized the Board to seek an injunction under the National Labor Relations Act and fall within the "Act of Congress" exception to § 2283. However, the error in the Board's argument was obvious and was rejected by both the District Court (A.49, 50) and the Circuit Court (A.62) on the basis that the complaint in Case No. 17-CA-3697 did not in any way involve the picketing at issue in the instant case. Of course, since the only applicable portions of the National Labor Relations Act¹⁵ require the issuance of a complaint prior to authorizing the Board to seek an injunction, the Board obviously did not fall within the "Act of Congress" exception to the limitations of § 2283. The Board has apparently decided not to burden this Court with such a frivolous argument and has admitted in its brief that it had no basis for obtaining an injunction under either § 10(j) or 10(l) of the Act. *See* Petitioner's brief at 29-30 n.14. With this admis-

¹⁵ Sections 10(j) and 10(l). *See* 29 U.S.C. § 160(j) and (l) (1965).

sion, the Board has thus apparently abandoned any argument that the instant case falls within the first statutory exception to § 2283.

There has never been any contention that the instant case presents an issue under the second statutory exception to the limitations of § 2283 as being necessary to aid the jurisdiction of the District Court as was the case in *Atlantic Coastline R.R. Co. v. Brotherhood of Locomotive Engineers*, *supra*. In addition, as is most often the situation in cases of this nature, "no one contends that the third exception contained in § 2283 'to effect or effectuate its judgments' is applicable." See *N.L.R.B. v. Swift & Co.*, 233 F. 2d 226, 232 (8th Cir. 1956). Still, the Board states that "Section 2283 is the only possible barrier to a hearing of the claim for injunctive relief in this case" see Petitioner's brief at 9. However, it is quite important to note that there is no claim made on behalf of the Board that this case falls within any of the three specific statutory exceptions to the limitations of § 2283.

C. The District Court Was Correct in Denying the Request of the Board For an Injunction Against the State Court Proceedings Under the "United States" Exception to the Limitations of 28 U.S.C. § 2283 (1965).

In addition to the three statutory exceptions to the limitations of § 2283, it has been established by this Court that the prohibition of § 2283 has no application to the United States as a party seeking an injunction of state court proceedings. See *Leiter Minerals v. United States*, 352 U. S. 220, 225-28 (1957). Upon this rationale, the Board contends that it is the United States for the purposes of this case and that it thus escapes the prohibition of § 2283. See Brief for Petitioner at 6-9. This argument was firmly rejected by both the District Court (A.45-46) and the Circuit Court (A.57-59). See also *N.L.R.B. v. Swift & Co.*, 233 F. 2d 226, 232 (8th

Cir. 1956). Of course, the decision to the contrary by Judge Thornberry in *N.L.R.B. v. Roywood Corp.*, 429 F. 2d 964, 970 (5th Cir. 1970) provided the conflict of the circuits upon which the Board based its petition in the instant case.

At first blush the argument of the Board that, as an agency of the federal government, it should be considered the United States for the purposes of this case contains a certain amount of appeal. However, the argument and the appeal are superficial only and disregard several quite basic distinctions. The first distinction that must be drawn consists of the basic realization that the Board is a governmental agency created by the Congress. The Congress did not create the Board to be the United States for all intents and purposes but, rather, to enforce a specific statute with specific powers following specified underlying policies and with specific limitations. . See *New Orleans v. United States*, 35 U. S. (10 Pet.) 662, 736 (1836); *Pacific Ins. Co. v. Soule*, 74 U. S. (7 Wall.) 433, 444 (1868).

As regards the Board's power to seek injunctions in federal courts, the Congress provided two routes, neither of which is applicable in the instant case.^{15a} Nevertheless, the Board argues that, apparently simply by virtue of its creation by Congress, it need not follow the restrictions on its power to seek injunctions established by Congress, and that it may proceed independently, claiming to be the United States.

This Court has previously rejected such an argument on the rationale that in order for governmental agencies to claim the immunity and privileges of the United States, it must be clearly shown that it was the inten-

^{15a} See Petitioner's brief at 29-30 n.14.

tion of Congress to bestow such privileges and immunities upon the agency in question, and that such privileges cannot be imputed from the mere fact that the agency exercises governmental functions. See *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81 (1941); *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381 (1939). The Court announced in *Keifer* the rule that "the government does not become the conduit of its immunity in suits against its agents or its instrumentalities merely because they do its work." *Id.* at 388. This rule was reaffirmed in the *Menihan* case with the statement that:

... [I]mmunity in the case of a governmental agency is not presumed. . . . [T]here is no presumption that the agent is clothed with sovereign immunity. We look as in the *Keifer* and *Burr* cases to see whether Congress has endowed Petitioner with that immunity and we find no indications whatever of such an intent. *Id.* at 84-85.

See also *F.H.A. v. Burr*, 309 U.S. 242 (1940); *United States v. Lee*, 106 U. S. 196, 213, 221 (1882); *Sloan Shipyards v. U. S. Fleet Corp.*, 258 U. S. 549, 567 (1921); *Nat'l Volunteer Home v. Parrish*, 229 U. S. 494, 496 (1912). Quite importantly for the purposes of this case, this Court has also noted that no judicial ruling may grant such privileges or immunity in a § 2283 case absent a specific congressional grant of such privileges or immunity, for the reason that Congress has "made it, clear beyond cavil that the prohibition (§ 2283) is not to be whittled away by judicial improvisation." See *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 514 (1955).

Yet, the Board urges this Court to imply such power and privileges for the Board in the instant case in order to allow the Board to circumvent the provisions of § 2283. The Board bases this request, in part, on the fact that various exceptions were judicially implied in

considering § 265, the predecessor of § 2283 and that those judicial exceptions were intended by the Congress to survive the change which created § 2283. See Petitioner's brief at 6-9, 11-18. Notwithstanding any judicially implied exceptions to former § 265 of the judicial code, the Board's argument must fall for the obvious reason that § 2283 has no implied exceptions, and none of the implied exceptions to former § 265 were intended to survive the change in the law. In support of this proposition the Respondent directs the Court's attention initially to the Reviser's Notes which the Board incorrectly characterizes as not suggesting that the previously recognized exceptions of § 265 were to be effected by new § 2283.

When § 2283 was enacted in its present form, it was changed to delete the prior exception which related only to proceedings in bankruptcy. In commenting upon this change, the Reviser's Notes state that "an exception as to Acts of Congress relating to bankruptcy was omitted and *the general exceptions substituted to cover all exceptions.*" See H. R. REP. No. 308, 80th CONG., 1st SESS. as reported in 28 U.S.C.A. § 2283, p. 107 (1965) (emphasis supplied). In commenting upon this change, this Court noted in *Amalgamated Clothing Workers v. Richman Brothers*, 348 U. S. 511 (1955):

We need not re-examine the series of decisions prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied exceptions to the historic prohibition against federal interference with state judicial proceedings. See *Toucey v. New York Life Ins. Co.*, 314 U. S. 118. By that enactment Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. The 1948 enactment revised as well as codified.

.....
In lieu of the bankruptcy exceptions of § 265, Congress substituted a generalized phrase covering

all exceptions, such as that of the Interpleader Act, 28 U.S.C. § 2361, to be found in federal statutes. Two newly formulated exceptions to the general prohibition deal with problems of judicial administration which had earlier been the subject of the series of decisions dealt with in the *Toucey* case. If confirmation of the comprehensive scope thus revealed on the face of the enactment were necessary, it is to be found in the Reviser's Notes, which state:

"An exception as to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover all exceptions."

* * *

This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions. *Id.* at 514-16.

The one exception in addition to the three specific statutory exceptions to § 2283 is found in the right of the United States, as the sovereign, to enjoin state court proceedings whenever "the prerequisites of relief by way of injunction be present." See *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, 225 (1957). This exception is not so much judicially implied as it is basic to the federal system of government and the "old and well-known rule" that statutes, such as § 2283, which divest pre-existing rights or privileges, such as that of the sovereign to seek a stay of state court proceedings which threaten irreparable injury to a national interest, will not be applied to the United States as the sovereign, without express words to that effect. See *Leiter Minerals, Inc. v. United States*, *supra* at 224; *United States v. U.M.W.*, 330 U. S. 258, 272 (1947).

However, it is also basic to the federal system of government that the federal government, though supreme in its own sphere, exist with limited jurisdic-

tion, based upon specified functions and subjects delegated to it by the states or legislated to it by the Congress. See *New Orleans v. United States*, *supra*; *Pacific Ins. Co. v. Soule*, *supra*; see also THE FEDERALIST Nos. 45, 46 and 47 (Madison) which is to be given special weight in matters involving basic federal policies, *Transportation Co. v. Wheeling*, 99 U.S. 273, 280 (1878). Thus, just as it is inherent in the federal system of government to reserve to the United States the right to enjoin state court proceedings notwithstanding the limitations of § 2283, it is also basic to the federal system of government to limit the Labor Board to those powers specifically given to it by Congress, and to accord it the status of the United States in this case only if it can be shown that the Congress has clearly demonstrated an intent to confer such powers upon the Board. See *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, *supra*; *Keifer v. Reconstruction Finance Corp.*, *supra*; *F.H.A. v. Burr*, *supra*; *United States v. Lee*, *supra*; *Sloan Shipyards v. U. S. Fleet Corp.*, *supra*; *Nat'l Volunteer Home v. Parrish*, *supra*.

The Board has not shown, and the Respondent has not found, any indication that the Congress intended to impart such power to the Board. There is no doubt that if Congress had wanted to give such power to the Board that it would not have had any difficulty in expressing such a desire. See *Bell v. United States*, 349 U. S. 81, 83 (1955). In fact, aside from purely geographic definitions which are used throughout the United States Code, the Congress has specifically defined the term "United States" on a number of occasions relating to the powers, privileges and immunities of the federal government and has never extended the general privileges of the United States to the Labor Board. See e.g., 26 U.S.C. § 4920(1)(4)(D) (1967) making agencies of the federal government the United

States for purposes of the Interest Equalization Tax; see also 16 U.S.C. § 460L-2 (Supp. 1971); 16 U.S.C. § 951(e) (Supp. 1971); 21 U.S.C. § 134(c) (Supp. 1971); 42 U.S.C. § 291b(c)(4) (1969); 47 U.S.C. § 330 (b)(2) (1962); 7 U.S.C. § 1301(a)(5) (1964); 7 U.S.C. § 1380p(d) (1964); 7 U.S.C. § 1561(a)(1) (Supp. 1971); 8 U.S.C. § 1185(d) (1970); 12 U.S.C. § 95a(3) (1945); 15 U.S.C. § 69(k) (1963).

Furthermore, it must be assumed that the Congress had knowledge of the decisions of this Court holding that the privileges and immunities of the United States are not conferred upon federal agencies in the absence of a specific congressional grant of such power. See *Federal Power Comm. v. Tuscarora Indian Nation*, 362 U. S. 99, 113 (1960) rehearing denied 362 U. S. 956 (1960); *T.I.M.E., Inc. v. United States*, 359 U. S. 464, 474 (1959); *Shapiro v. United States*, 335 U. S. 1, 16 (1948). Therefore, the Congress could certainly have provided for such a grant of power in either the initial statute establishing the Labor Board or in either one of the two major amendments in 1947 or 1959, had it wished to do so.

Since the Congress has not specifically granted the Board the power to exercise the privileges and immunities of the United States, the Respondent submits that it is obvious that the Congress did not intend to give the Board this power. This Court has previously recognized that the Congress regulates by silence as well as by action, and the Respondent submits that the omission of a congressional grant to the contrary compels the conclusion that the National Labor Relations Board is not to be considered the United States for the purposes of this action. See *Passenger Cases*, 48 U. S. (7 How.) 283, 562 (1849). In these circumstances, the Circuit Court was obviously correct in affirming the decision of the District Court to deny the in-

junctive relief sought by the Board. The Respondent urges this Court to also conclude that the Board cannot properly be considered the United States for the purposes of this case, and that the injunctive relief sought by the Board was properly denied.

II.

The Nebraska Mass Picketing Statute does not constitute an unlawful infringement into a federally preempted area.

A. The Constitutionality of the Nebraska Statute Is Not Properly Before This Court on Any Issue Other Than Federal Preemption.

In its petition for a writ of certiorari to the Circuit Court, the Board stated that the question presented by the instant case was

Whether an agency of the United States is within the governmental exception to the statute which ordinarily prohibits federal courts from enjoining state court proceedings, 28 U.S.C. 2283, so that the National Labor Relations Board may, through proceedings in a federal court, enjoin the implementation of a state court order which regulates peaceful picketing governed exclusively by the National Labor Relations Act. See Board's petition at 2.

Without bothering to discuss whether or not the picketing in the instant case was peaceful or not, the Board's argument to this Court on the merits has generally stayed within the limits of the question upon which certiorari was granted. However, the Board does make at least one footnote swipe at the constitutionality of the state statute on the grounds that it is broad enough to chill the exercise of "purely peaceful picketing." See Board's brief at 34-35 n.16.

The Union, as amicus curiae, levels a broad attack at the state statute and the injunction issued thereun-

der that ranges far beyond the federal preemption considerations of the question presented in the Board's petition for certiorari. For example, the Union contends that the statute is unconstitutionally broad and vague, prohibits activity protected by the First Amendment, and adds to a lack of uniformity in state regulation of picketing. See Union's brief at 3-6, 7-15. The Company submits that these areas raise additional questions and change the substance of the one question presented by the Board in its petition for certiorari and, thus, are not properly before this Court. See Rule 40(1)(d)(2) of the rules of this Court; see also *Neeley v. Ebey Const. Co.*, 386 U. S. 317, 330 (1967); *J. I. Case Co. v. Borak*, 377 U. S. 426, 428-29 (1964); *State of California v. Taylor*, 353 U. S. 553, 556-57 n.2 (1957).

Further indication that the issues raised by the Union are not contained within the question upon which certiorari was granted and thus not properly before this Court, is found in the fact that even if the issues presented by the Union were presumed to be true, the issue upon which certiorari was granted would not be affected. This is so for the reason that the questions presented by the Union would still not place the Board under any of the three statutory exceptions or the "United States exception" to § 2283 and are, therefore, irrelevant in the determination of the question presented by this case.

Even if the questions presented by the Union were held to be fairly encompassed within the question presented in the Board's petition for certiorari, the unconstitutionality of the Nebraska statute is still not properly before this Court for the reason that state remedies regarding this issue have never been exhausted.^{15b}

^{15b} Since the First Amendment claims of the Union are not properly before this Court, the federal courts should follow the

Section 2283 has been characterized by this Court as continued recognition on the part of the Congress of the ability of the state courts to adequately safeguard federal and constitutional rights. See *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 517-19 (1955). Thus, if the Union is concerned about the constitutionality of the state statute on the additional grounds that it presents to this Court, the more proper course of action would be for the Union to complete the state court injunction proceedings¹⁶ and then, appeal to the Nebraska Supreme Court if the Union considers the district court ruling to be improper. Of course, the Union also has the right to appeal to this Court from the Nebraska Supreme Court, and there is no reason to believe that the state courts cannot, or will not, protect any federal rights involved in the instant case. See *Douglas v. City of Jeanette*, 319 U. S. 157, 164 (1943) accord, *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639, 642 (4th Cir. 1969); see also *Stevens v. Frick*, 372 F. 2d 378, 382 (2d Cir. 1967); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 296 (1970); *Robb v. Connolly*, 111 U. S. 624, 637 (1884).

Since the state court had the right to regulate the picketing in the instant case by virtue of the state police powers, a ruling by this Court that the constitutionality of the state statute should be considered in the instant case would present voluminous problems.

"abstention doctrine" and allow the state courts the first opportunity to pass upon the constitutionality of the Nebraska statute. See *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 499-502 (1941); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176-177 (1959); see also *Zwickler v. Koota*, 389 U.S. 241, 245-52 (1967).

¹⁶ The state court proceeding, Case No. 16860 before the District Court of Hall County, Nebraska has never proceeded to a hearing on a permanent injunction at the request of local counsel for the Union that the matter be held in abeyance until the federal court proceedings have been completed.

For example, since the action was first brought in the state court, which would allow for appeal of any federal claims to be the Nebraska Supreme Court and ultimately to this Court, basic principles of comity between federal and state courts require that the constitutionality of the state statute be litigated first in the state court. See *c.f.*, *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 488 (1900); *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947); *Milwaukee Gas Speciality Co. v. Mercoid Corp.*, 104 F. 2d 589 (7th Cir. 1939).

Additionally, a decision by this Court on the constitutionality of the state statute before the Nebraska courts have had an opportunity to rule on the matter would encourage federal courts to interfere with controversies involving matters such as picketing where the line between concurrent jurisdiction and federal preemption is not always clear-cut, and the number of courts which could potentially pass on a controversy before the rightful forum for its settlement was established under such a system would be significantly increased. Furthermore, there would be added to this situation "an element of federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." See *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 519 (1955).

For all of these reasons, the Company urges the Court to conclude that beyond the federal preemption issue raised by the question presented in the Board's petition for certiorari, the additional issues raised by the Union relating to the constitutionality of the Nebraska statute are not properly before this Court.

B. The Nebraska Statute Did Not Improperly Invade a Field Preempted by Federal Legislation.

This Court has long recognized that states have a valid interest in the regulation of picketing which, like

that in this case, is clearly not peaceful picketing. See *Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292, 294 (1941); *Youngdahl v. Rainfair*, 355 U. S. 131, 139 (1957); *Carpenters Local 213 v. Ritters Cafe*, 315 U.S. 722, 738-39 (1942) (dissenting opinion); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 206 (1921); *U.A.W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 274 (1956). For this reason, the Court has recognized that state mass picketing statutes such as the Nebraska statute which authorized the injunction in the state court, constitute a valid exercise of the state police powers. See e.g. *U.A.W. v. Anderson*, 351 U. S. 959 (1956); *U.A.W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271-72 (1956); *Allen-Bradley v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1942); *Youngdahl v. Rainfair Inc.*, 355 U. S. 131, 138-39 (1957); *U.A.W. v. Russel*, 356 U.S. 634, 640 (1958); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 386 (1969); *U.M.W. v. Gibbs*, 382 U. S. 715, 721 (1966); *Int'l Brotherhood of Teamsters v. Vogt, Inc.*, 354 U. S. 284, 293 (1957); *U.M.W. v. Laburnum Construction Corp.*, 347 U. S. 656, 669 (1954).

As noted previously, there is no justification for concluding that the instant case presents a situation of peaceful picketing. Quite the contrary, the matters which the Company draws to the Court's attention, and which may properly be considered under the doctrine of judicial notice, compel the conclusion that the picketing in the instant case was definitely not peaceful. Such a situation does not present a federal preemption question for, as this Court has recently noted, "the National Labor Relations Act gives no colorable protection to violent and coercive conduct incident to a labor dispute." See *Brotherhood of Railroad Trainmen v. Jack-*

sonville Terminal Co., 394 U. S. 369, 386 (1969); see also *Allen-Bradley v. Wisconsin Employment Relations Board*, 315 U. S. 740, 750 (1942); *Taggart v. Weinacker's, Inc.*, 397 U. S. 223, 228 (1970) (concurring opinion); *U.M.W. v. Gibbs*, 383 U. S. 715, 721 (1966).

The Board and the Union raise various constitutional questions regarding the area of federal preemption, but all of the arguments are based upon the fallacious premise that the picketing in the instant case was peaceful. See Board's petition at 2. See also Board's brief at 34-35 n.16, Union's brief at 6-7. However, since any claim that the picketing in the instant case was peaceful is not factually supported, the Company submits that the issue of federal preemption may not be used to invalidate the state statute in this case. Rather, the Company submits that the facts of this case show the state statute and injunction issued thereunder to be a valid exercise of the state police powers and, thus, not properly before this Court for judgment.

C. Even if the Nebraska Statute Improperly Invaded a Field Preempted by Federal Legislation, the District Court Was Not Thereby Impowered to Ignore the Limitations of 28 U.S.C. § 2283.

Notwithstanding the fact that the instant case does not fall within any of the three statutory exceptions, or clearly within the "United States exception" to § 2283, the Board urges this Court to judicially legislate an exception to § 2283 which would allow the Board to seek injunctions in federal courts against the intrusion by state courts into the labor relations field. See Board's brief at 9-10. The Board reasons that Congress has not made an express grant of authority to the Board for every legal proceeding that may be required in the Board's administration of the Act and because the supremacy of the National Labor Relations Act would be "substantially impaired" if the Board were unable to

enjoin state courts that issue injunctions in the field of labor relations. See Board's brief at 9-10.

This federal preemption argument on the part of the Board is simply another attempt to have this Court disregard the limitations of § 2283. It was also used in the District Court, and was firmly rejected because of the anomalous "decision-before-judgment" stature of the argument, which totally disregarded the initial jurisdictional limitations of § 2283. As Justice Cardozo once noted, in words particularly applicable to the argument presented by the Board in the instant case:

Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. See *Berkovitz v. Arbib*, 230 N.Y. 261, 274 (1921).

Thus, it is understandable that the District Court concluded that the Board must first bring itself within one of the exceptions to § 2283 in order to give the lower court jurisdiction before any preemption argument would be considered (A.47-48).

Before this Court the Board acknowledges that it does not fall within any of the three statutory exceptions to § 2283, argues somewhat weakly that it should be considered to be the United States for the purposes of this case and thus exempted from the limitations of § 2283, and finally, that this Court should judicially imply the power of the Board to seek injunctions in federal court against state court injunctions in the field of labor relations due to the supremacy of the federal law. When all of these arguments are sifted, the third and final argument appears to shed much more light upon what the Board is actually trying to accomplish by this case. The Board, in actuality, is urging this Court to legislate a power which the Congress has not given to the Board and to judicially imply an excep-

tion onto the clear Congressional determination that federal courts *may not* enjoin state court proceedings unless the case falls within three well-defined exceptions.

However, the judicial power of review and interpretation does not include legislation and the Board urges this Court to do something that is not within its powers. See *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 404 (1937) (dissenting opinion); *Hampton and Co. v. United States*, 276 U. S. 394, 406 (1928); *Evans v. Gore*, 253 U. S. 245, 247 (1920); *Springer v. Phillipine Islands*, 277 U. S. 189, 201 (1928); *O'Donoghue v. United States*, 289 U. S. 516, 530-31 (1933).

The Board's argument has already been considered and rejected by this Court in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511 (1955), wherein the Court specifically considered the preemption argument as it related to 28 U.S.C. § 2283 and concluded:

In the face of this carefully considered enactment (§ 2283), we cannot accept the argument of petitioner and the Board, as *amicus curiae*, that § 2283 does not apply whenever the moving party in the district court alleges that the state court is "wholly without jurisdiction over the subject matter, having invaded a field preempted by the Congress." No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the as-

sumption that ascertainment of pre-emption under the Taft-Hartley Act is self determining or even easy. As we have noted in the *Weber* case, "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delineation by fixed metes and bounds." 348 U.S. at 480. *Id.* at 515-16.

In addition to these basic problems with the Board's preemption argument, the Company points out that if the labor field is arguably preempted by the federal legislation which established the Labor Board and gave it its powers, then the Board should be required to comply with the terms of that legislation before seeking to enforce a federal preemption doctrine. However, as previously noted, no complaint has been issued in the instant case which would allow the Board to proceed to the district court to seek an injunction under the terms of § 10(j) or 10(1) of the Act. If the jurisdiction of the Board has not even properly attached in the instant case under the statutes alleged to have created a federally preempted field, then it would be manifestly illogical to conclude that the District Court should have been given jurisdiction by virtue of those same statutes.

The Board and the Union appear to agree that the main reason for seeking an injunction in the District Court centered on a concern that the federal rights asserted would be improperly subjected to lengthy delay prior to vindication if the Nebraska Court were allowed to retain jurisdiction. See Board's brief at 36 and Union's brief at 10-12. The District Court noted this concern but also specifically noted the limitations of § 2283 and concluded that "Congress has precluded this Court from acting, seeking instead to maintain the traditional dichotomy of the federal and the state courts. We assume, as is proper, that federally protected rights

will be vindicated in state courts to the same extent that they would find vindication in the federal courts." (A.51).

In addition to the assumption that federal rights will find vindication in the state courts as quickly as they would in the federal courts, the Company notes that if the Union or the Board actually faced the threat of "immediate irreparable injury" sufficient to justify an injunction under usual equitable principles, due to the state court injunction, either would have been free to seek injunctive relief from the Nebraska courts or this Court. See NEB. REV. STAT. § 25-2006, 2007, 25-1063, 1064 (Reissue 1964); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 296 (1970); *Natural Gas Co. v. Public Service Comm.*, 294 U.S. 698 (1935); *United States v. Moscow Fire Ins. Co.*, 308 U. S. 542 (1939); see also *Construction & General Laborers Local 438 v. Curry*, 371 U.S. 542 (1963). Furthermore the Union could have utilized a specific Nebraska statutory procedure which allows for expedited trial in the state District Court and the Nebraska Supreme Court in situations where an injunction is sought in federal court against the administration of a Nebraska statute. See NEB. REV. STAT. § 25-21,165 to 21,167 (Reissue 1964).

Many courses of action were open to the Board and the Union in the instant case and it is not immediately clear why they chose to proceed in the direction utilized in the instant case. In any event, it is clear that the Board admits that the instant case does not fall within any of the specified exceptions to § 2283 which explicitly prohibits federal courts from granting injunctions against state court proceedings. Furthermore, the Board tacitly admits that its argument that it should be considered the United States for the purpose of this

action and thereby exempted from the provisions of § 2283 is not completely convincing, for the Board goes on to urge this Court to judicially imply an exception for the Board in injunction proceedings such as this on the basis of federal preemption and allow it to escape the limitations of § 2283. However, the dual system of federal and state courts is as old as the constitution itself and the prohibition against federal court injunctions of state court proceedings has been law since 1793. See *Atlantic Coastline R. R. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 285 (1970); see also Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-48 (1930).

The Congress has maintained the prohibition of § 2283, in some form, ever since that time and this Court has consistently expressed a desire to have federal courts avoid needless friction and conflict with state courts. See *Hale v. Bimco Trading Co., Inc.*, 307 U. S. 375, 378 (1939); *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U. S. 4, 8-9 (1939); *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 141 (1941); *Porter v. Dicken*, 328 U. S. 252, 254-55 (1946); *Elkins v. United States*, 364 U. S. 206, 221 (1960); *Atlantic Coastline R. R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 286 (1970).

It is true that the Congress has passed a good deal of legislation in the labor field and has indeed established the National Labor Relations Board to enforce those statutes. However, the Congress has granted the Board only two procedures to obtain injunctions in federal courts and it must be remembered that the Congress regulates by silence as well as by action. *Passenger Cases*, 48 U. S. (7 How.) 283, 562 (1849). Had the Congress wished the Board to be allowed a general power to obtain injunctions or more than the two pow-

ers specified, it must be assumed that the Congress would have enacted legislation to accomplish that purpose. In the absence of such legislation, it must be assumed that the Congress did not intend to provide the Board with such power and any change in that situation will of necessity have to come from the Congress, rather than this Court.

CONCLUSION

For all of the foregoing reasons, the Company urges this Court to conclude that the District Court was correct in dismissing the Board's petition for an injunction of the Nebraska state court proceedings.

Respectfully submitted,

NASH-FINCH CO d/b/a JACK &
JILL STORES, Respondent.

By NELSON, HARDING, MARCHETTI,
LEONARD & TATE
William A. Harding and
Richard P. Nelson
300 N.S.E.A. Building
P. O. Box 82028
Lincoln, Nebraska 68501
Attorneys for Respondent

Dated at Lincoln, Nebraska
this 8th day of September, 1971.

ADDENDUM A

IN THE DISTRICT COURT OF HALL
COUNTY, NEBRASKA

Case No. 16860

DOC. 56, PAGE 251

NASH-FINCH COMPANY, d/b/a,
JACK & JILL STORES, Plaintiff,

V.

AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO,
DISTRICT UNION 271; ROBERT J. PARKER;
VERNON ALLEN; CHESTER W. O'HARA; J.B.
DE FONTAIN; JOHN DOE; AND MARY DOE,
DEFENDANTS.

PETITION

Comes now the Plaintiff and for its cause of action
against the defendants alleges:

1. That the Plaintiff is a corporation organized and existing under the laws of the State of Delaware authorized to conduct business in the State of Nebraska.
2. That the defendant Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, District Union 271, hereinafter referred to as District Union No. 271, is an unincorporated association existing for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Defendant Robert J. Parker is a business representative of District Union No. 271. Defendant Vernon Allen is a business representative and first vice-president of District Union No. 271. Defendant Chester W. O'Hara is the president of District Union 271. Defendant J. B. DeFontain is the secretary-treasurer of

District Union No. 271. Defendants John Doe and Mary Doe, real and true names unknown are pickets, agents, employees and servants of District Union No. 271.

3. That on May 23, 1969, defendants commenced picketing and continue to picket plaintiff's three retail grocery establishments located in Grand Island at 2121 North Broadwell, 1717 West Second Street, and 1515 South Locust Street.

4. That during the course of the aforesaid picketing, defendants have engaged in the following acts and conduct:

- (a) Picketing the entrances and exits of plaintiff's retail stores by means of more than two pickets at the same time within 50 feet of said entrances and exits.
- (b) Picketing by means of more than two pickets at the same time within 50 feet of each other.
- (c) Stopping, blocking, and preventing the free ingress egress of the public to and from the picketed premises.

5. That the foregoing acts and conduct of defendants constitutes mass picketing as proscribed by Section 28-814.02, R. R. S. Neb. 1943, Reissue 1964.

6. That said picketing is conducted by the display of signs bearing the following legend:

'Amalgamated Meat Cutters, District Union No. 271, AFL-CIO, on strike, protesting unfair labor practices, Nash-Finch Company, Jack & Jill Stores. This dispute with the above named employer only,'

and the distribution of handbills to the public, a copy of which is attached hereto marked Exhibit A, and by this reference made a part hereof.

7. That the above representations to the public that a strike exists and that plaintiff has engaged in unfair

labor practices constitutes false and malicious statements proscribed by Section 28-440, R. R. S. Neb., Re-issue 1964.

8. That during the course of said picketing, defendants have threatened, intimidated, and coerced the public and plaintiff's customers by the following acts and conduct:

- (a) Threatening customers with property loss if they patronize plaintiff's establishments.
- (b) Using profane and vulgar language and addressing motorists and plaintiff's customers in a loud, boisterous manner when insisting that they patronize plaintiff's competitors.

9. That during the course of said picketing, defendants have slandered plaintiff's business reputation in the community by falsely and maliciously telling plaintiff's customers that, "There are ants in the meat products."

10. That by reason of the foregoing unlawful picketing and other conduct, plaintiff's operations at its three retail establishments in Grand Island, Nebraska, have been disrupted and the business of the plaintiff has been substantially impaired and diminished. Unless the Restraining Order and Injunction prayed for herein is granted, plaintiff will be further injured and damaged as a result of defendants aforesaid unlawful picketing and other conduct. Plaintiff is suffering immediate and irreparable damage as a result of defendants acts and conduct, and plaintiff does not have an adequate and complete remedy at law.

11. This Court has jurisdiction to enjoin acts and conduct which are violative of the laws of the State of Nebraska, irreparably damage the business reputation of the company, and which breaches the peace of the

community by creating an atmosphere of public intimidation, restraint, and coercion.

WHEREFORE, the plaintiff prays for relief as follows:

- (a) That this Court issue a temporary Restraining Order enjoining defendants, its members and agents, and all persons acting in its behalf from picketing and striking plaintiff's three retail stores in Hall County Nebraska, and from otherwise interfering by picketing, striking or other conduct with plaintiff's operations and business in Hall County Nebraska.
- (b) That the Court set this matter for hearing for a Temporary Injunction and that upon such hearing the Court enter its Temporary Injunction continuing said restraining order in effect until trial may be had.
- (c) That upon trial the Court enter its Final and Permanent Injunction enjoining the defendants in like manner as in aforesaid Restraining Order.
- (d) That this Court grant such other relief as in the premises seems just and equitable and award costs of this action to the Plaintiff.

Dated this 27th day of May, 1969.

NASH-FINCH Company, d/b/a,
JACK & JILL STORES, Plaintiff

By: Thomas F. Dowd
Its Attorney

STATE OF NEBRASKA)
) SS
COUNTY OF HALL)

THOMAS F. DOWD, being first duly sworn upon oath, deposes and says that he is the Attorney for the

plaintiff herein, a corporation, that he has read the above and foregoing Petition; knows the contents thereof, and that the allegations contained therein are true as he verily believes.

Thomas F. Dowd

SUBSCRIBED AND SWORN to before me this 27th day of May, 1969

Notary Public

EXHIBIT A

To The Public

JACK & JILL STORES

(of Nash-Finch Company)

Grand Island, Nebraska

Are On Strike

Protesting Unfair Labor Practices

Of This Company

**THIS COMPANY REFUSES TO BARGAIN OR COMPLY WITH
OTHER FINDINGS AND RECOMMENDATIONS OF A TRIAL
EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD.**

Please Help Us By Not

Shopping at Jack & Jill Stores

Or Any Other Stores Operated By This Company

During This Strike

District Union 271 of the

Amalgated Meat Cutters & Butcher

Workmen of North America, AFL-CIO

AFFIDAVIT

CAL FREY, being first duly sworn, deposes and states under oath:

1) That he is the store manager of the Jack & Jill Store located at 2121 North Broadwell, Grand Island, Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the Jack & Jill Store located at 2121 North Broadwell, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That none of the employees of the Jack & Jill Store located at 2121 North Broadwell, Grand Island, Nebraska, are on strike.

4) That since the picketing commenced on May 23, 1969, I have observed more than two pickets within fifty feet of each other at the same time and more than two pickets within fifty feet of the store parking lot entrances and exists at the same time on more than one occasion each day.

5) That since the picketing commenced on May 23, 1969, I have personally observed pickets standing in the middle of the parking lot entrances and exists interfering with and hindering ingress and egress of motorists on more than one occasion during each day of the picketing.

Further your affiant sayeth not.

Cal Frey

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

AFFIDAVIT

DON SALLINGER, being first duly sworn, deposes and states under oath.

1) That he is the manager of the Jack & Jill Store located at 1515 South Locust Street, Grand Island, Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the Jack & Jill Store located at 1515 South Locust Street, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That as a result of the picketing which commenced on May 23, 1969, only one employee of this store has failed to return to work, and said employee had tendered her resignation effective June 6, 1969, prior to the May 23, 1969 commencement of picketing.

4) That on May 26, 1969, I personally observed a picket standing in front of and blocking the ingress of a customer motorist, and have received complaints from customers that their vehicles had been stopped by pickets when attempting to enter the store's customer parking lot.

Further this affiant sayeth not.

Don Sallinger

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

AFFIDAVIT

HERB ROESER, being first duly sworn, deposes and states under oath:

1) That he is the store manager of the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That none of the employees of the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska, are on strike.

4) I have personally observed on more than one occasion, each and every day of the picketing, pickets standing in the middle of the entrances and exists to the customer parking lot blocking traffic and hindering and obstructing the free ingress and egress of customers of this store.

5) On May 24, 1969, a customer reported to me the use of vulgar and profane language by the picket which she encountered upon entering this store's customer parking lot.

6) On May 24, 1969, a youngster complained to me that the picket had told him not to buy anything in this store or else he might not have a bike when he came out. On May 25, a customer reported to me that she had been told by the picket upon entering this store's customer parking lot that there were ants in this store's meat.

7) After having observed more than two pickets within fifty feet of each other standing in the middle of the entrances and exits of the store's customer parking lot, including the presence of Robert J. Parker, Union business agent, I notified the Grand Island Police Department and witnessed the pickets disbursing as soon as the police patrol car was observed.

8) I have observed more than two pickets congregating together within fifty feet of each other in this store's entrances and exits to the parking lot after the Grand Island Police Department patrol cars have left the area.

Further your affiant sayeth not.

Herb Roeser

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

AFFIDAVIT

CLAYTON KENT, being first duly sworn, deposes and states under oath:

1) That I am employed as the zone manager by the Plaintiff herein, for the State of Nebraska.

2) That commencing on May 23, 1969, Defendant District Union 271 commenced picketing and distributing handbills at the three Jack & Jill Stores located at 2121 North Broadwell, 1515 South Locust Street, and 1717 West Second Street, Grand Island, Nebraska. The legend on the picket signs and the printed matter on the handbills is as alleged in the Petition.

3) That as a result of the picketing which commenced on May 23, 1969, only one employee of Plaintiff's three retail establishments in Grand Island, Nebraska, has failed to return to work, said employee having tendered her resignation effective June 6, 1969, prior to commencement of the instant picketing.

4) Since the commencement of the picketing I have observed more than two pickets within fifty feet of each other on more than one occasion on each day of the picketing at the Jack & Jill Store located at 1717 West Second Street, Grand Island, Nebraska. Specifically, I have observed Robert J. Parker and Vernon Allen, business representatives of the Union, standing with two pickets in the middle of the customer parking lot entrance at the 1717 West Second Street store, within fifty feet of each other, which hindered and interfered with the free ingress of traffic.

6) I have personally observed on more than one occasion, each and every day of the picketing, pickets standing in the middle of the customer parking lot entrances and exits at the Jack & Jill store located at 1717 West Second Street.

Further this affiant sayeth not.

Clayton Kent

Subscribed and sworn to before me this 27th day of May, 1969.

Thomas F. Dowd
Notary Public

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 70-93

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NASH-FINCH COMPANY, d/b/a JACK AND JILL
STORES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

**BRIEF AMICUS CURIAE ON BEHALF OF THE CHAM-
BER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF RESPONDENT.**

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**BRIEF AMICUS CURIAE ON BEHALF OF THE CHAM-
BER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF RESPONDENT.**

INTEREST OF THE AMICUS CURIAE.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade associations, with an underlying membership of approximately 5,000,000 business firms and individuals and a direct business membership in excess of 38,000. It is the largest

* This brief is filed with the express written consent of counsel for both Petitioner and Respondent in accordance with Rule 42(2) of the Court.

association of business and professional organizations in the United States.

The National Chamber has appeared as *amicus curiae* before this Court in various matters of concern to its members and which have affected those members significantly in a wide variety of business relationships.¹ The instant case decidedly is within that category.

The underlying problem presented in the instant case is a substantial and recurring one, and one which has immediate and continuing impact on the membership of the National Chamber. It is manifestly important that employers, subjected to the deleterious consequences of unlawful union picketing and boycott activity, violative of state law as well as federal labor laws, should have the widest range of lawful avenues of redress available to them and once the state has acted to enjoin such illegal union conduct, should be permitted to rely on those protections afforded by the state court. It is apparent that a decision by this Court in this case will have a direct and far reaching effect on

1. While arising in a somewhat different context than that present herein, the National Chamber has demonstrated a continuing interest in seeking a determination by this Court of the manner in which employees can seek and receive protection from the adverse effects of unlawful picketing and boycott activity engaged in by unions. For example, the National Chamber recently filed briefs, *amicus curiae* in *The Los Angeles Herald-Examiner, et al. v. Kennedy*, 91 S. Ct. 12 (1970) and *Sears, Roebuck & Co., et al. v. Solien, et al.*, U. S., 77 LRRM 2403 (No. 1588, October Term, 1970), seeking to define their status in district court proceedings brought by the National Labor Relations Board pursuant to Section 10(1) of the LMRA (29 U. S. C. A. 160(1)). Moreover, the issue of the extent to which state court action is available to employers to protect them against the adverse effects of unlawful union activity has been and continues to be of critical importance to employers subjected to this activity. In this regard, it should be noted that the National Chamber filed a brief *amicus curiae* in this Court in the recent case of *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U. S. 235 (1970).

whether or not those available avenues are preserved.² It is in the role of representative of a significant number of employers whose effective functioning and, in some cases, very existence, is often directly threatened by unlawful union activity, that the National Chamber considers it important to present to this Court its views in support of affirmance of the lower court decision in the instant case.

INTRODUCTORY.

In approximately May, 1969, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), began picketing at the Respondent's Grand Island, Nebraska facility. During the course of its picketing, the Company alleged that the Union threatened and intimidated Respondent's customers, blocked ingress and egress of the public to and from the picketed premises and engaged in certain other acts, violative of state law. As a consequence of this alleged conduct, and in order to afford protection therefrom to itself, its customers and the general public, on May 27, 1969, the Respondent petitioned the District Court of Hall County, Nebraska for injunctive relief. On May 28, 1969, the State Court issued a restraining order against the Union and, subsequently, upon its determination that the method and

2. In *Boys Markets, supra*, this Court upheld the power of a state court to enjoin a union's strike in violation of a "no-strike" clause in the parties' collective bargaining agreement. Thus, this court established that state courts do, in fact, have a legitimate role to play in resolving labor relations disputes even when the subject matter of those disputes also falls within the ambit of applicable federal law. In so holding, this Court recognized, the role to be played by state courts despite their awareness that one result of their decision would be to create "a certain diversity . . . among the state and federal systems in matters of procedural and remedial detail. . . ." 74 LRRM, at 2261. In the instant case, therefore, one of the consequences that would result from adoption of the Board's position would be to substantially detract from the spirit and intent of this Court's determination in *Boys Markets*.

manner of the Union's picketing was in fact, violative of state law, on June 25, 1969, issued a temporary injunction limiting the Union's picketing in certain respects.

At no time did any of the parties to the dispute seek to invoke the jurisdiction of the National Labor Relations Board concerning the picketing or the state court injunction. Nevertheless, the Board on August 29, 1969, *sua sponte* sought to inject itself into the matter by filing a complaint in the United States District Court for the District of Nebraska and on September 5, 1969, by filing a motion for a preliminary injunction seeking to restrain the Respondent herein from enforcing or attempting to enforce portions of the state court injunction.

On September 26, 1969, upon motion of Respondent, the Federal District Court dismissed the Board's complaint on the ground that the District Court did not have jurisdiction due to the limitations of 28 U. S. C. Section 2283 which prohibits a federal district court from granting "an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The District Court held that the Board's action could not be maintained either by application of any of the three expressed exceptions to the statute or by application of the implied exception given the United States when it sues as a party.

The Board thereupon unsuccessfully appealed the adverse decision of the District Court to the United States Court of Appeals for the Eighth Circuit. In its appeal, the Board contended (i) that as a federal agency of the United States it should be considered as if it were the "United States" for the purposes of Section 2283 and, therefore, the prohibition of the statute was not applicable; (ii) that because the state court was wholly without jurisdiction over the subject matter, the federal preemption in the area pre-

cluded applicability of the state; and (iii) that the "as authorized by an Act of Congress" or "in aid of its jurisdiction" exceptions to the statute were applicable.

The Circuit Court rejected the Board's contentions and held that in the absence of a showing of clear Congressional intent to bestow the privileges and immunities of the United States upon administrative agencies the Board was not privy to the exception of Section 2283 afforded the United States. Further, it held that the prohibition of Section 2283 could not be circumvented by the preemption doctrine, even when that doctrine would otherwise be unarguably applicable; and finally, that unless the union's picketing had been made the subject of an unfair labor practice charge and complaint allowing the Board to seek federal district court injunctive relief under either Section 10(j) or 10(l) of the National Labor Relations Act, the specific exceptions of Section 2283 were similarly not applicable.

In its Petition for a Writ of Certiorari to this Court, the Board abandoned its other contentions and relied exclusively on its contention that Section 2283 is not applicable because the National Labor Relations Board as a federal administrative agency is the "United States" for the purpose of Section 2283 and, therefore, that Section does not bar a federal district court, upon application by the Board, from enjoining a state court decree.

ARGUMENT.

The principal question presented for review is whether the prohibitions of the Anti-Injunction Statute (28 U. S. C. 2283) prevent a federal district court, upon petition by the National Labor Relations Board, an agency of the United States Government, from enjoining state court proceedings, when the basis for the Board's action does not fall within any of the statutorily defined exceptions to the statute.

In the instant case, the Board is contending that the clear and unambiguous provisions of the Anti-Injunction Act and the prohibitions expressed therein cannot be applied to the Board. While acknowledging that its position cannot be sustained by application of any of the three legislatively expressed exceptions to the statute's coverage, the Board nevertheless contends that the "governmental exception", judicially created and defined by this Court in *Leiter Minerals, Inc. v. United States*,³ is applicable to the Board as an administrative agency of the United States.

It is the position of the National Chamber that neither legislative history, judicial decision nor this Court's decision in *Leiter* supports the Board's position herein.

I. The Statutory History and Judicial Authority Regarding Section 2283 Evidences No Rationale for Excepting the National Labor Relations Board from the Prohibition Expressed in the Statute.

The antecedents of the present Anti-Injunction Act are ancient. In Section 5, of the Act of March 2, 1793, enacted four years after the passage of the Judiciary Act of 1789,⁴ which authorized the removal of state court proceedings to inferior federal courts, Congress enacted the first Anti-Injunction Statute,⁵ which provided: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . .". While a literal reading of the statutory language indicates a congressional intent to impose an absolute prohibition on the federal courts to enjoin state proceedings, the absence of any recorded debate concerning Congress' motivations for its initial adoption immediately led to a conflict in the courts. Various theories have been

3. 352 U. S. 220 (1957).

4. Judiciary Act of 1789, Ch. 20, Section 12, 1 Stat. 73.

5. Act of March 2, 1793, Ch. 22, Section 5, 1 Stat. 334-35.

advanced concerning early legislative intent. For example, the original statute has been interpreted as representing an attempt to temper the friction engendered by the interference with state court adjudicative processes resultant from the Judiciary Act of 1789⁶; early congressional anxiety over federal encroachment on state judicial power⁷; and a legislative and congressional aversion to equity jurisdiction in general.⁸

Notwithstanding the multiplicity of theories advanced, it is generally accepted that the Anti-Injunction Acts have been utilized to avoid friction between the federal government and the states resulting from the imposition of federal judicial authority into the orderly functioning of a state's judicial process.⁹ This purpose was stated by Mr. Justice Frankfurter in *Hale v. Bimco Trading, Inc.*, when he wrote that the Act served as "an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts . . .".¹⁰

Yet, despite this commonly recognized purpose, the case history of the Anti-Injunction Act reveals that its proscriptions were more honored in their breach than in their adherence by the federal courts which tended to ignore the

6. See Reaves, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad*, 5 Ga. Law Rev. 294, 295 (1971).

7. See Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345, 347 (1930).

8. See *Toucey v. New York Life Ins. Co.*, 314 U. S. 118, 131-32 (1941).

9. *Oklahoma Packing Co. v. Oklahoma Gas and Electric Co.*, 309 U. S. 4, 8-9 (1940).

10. 306 U. S. 375, 378 (1939).

Act's sanctions and continuously carved various judicial exceptions out of the general legislative prohibition.¹¹

In response to this judicial emasculation of the purpose and intent of the Anti-Injunction Act, in 1941, this Court, in *Toucey v. New York Life Insurance Company*,¹² held that the engrafting of judicial exceptions to the then existing Anti-Injunction Act was unwarranted and in derogation of congressional intent.¹³ The philosophy of the majority of the Court in *Toucey*, expressed by Mr. Justice Frankfurter, was that the terms of the Anti-Injunction Act should be applied strictly and against federal power:

"... the purpose and direction underlying the provision is manifest from its terms: proceedings in the state courts should be free from interference by federal injunction. The provision expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court."

Although the issue before the Court in *Toucey* was narrow—the power of the federal court to stay a proceeding in a state court where the issue before the state court had already been adjudicated in the federal court—broad language utilized by the Court in *Toucey* was interpreted as having eliminated the previously described judicially

11. E.g., *Marshall v. Holmes*, 141 U. S. 589 (1891) (multiplicity of actions); *Ex parte Young*, 209 U. S. 123 (1908) (action based on unconstitutional statute); *Julian v. Central Trust Co.*, 193 U. S. 93 (1906) (federal court obtained custody of a res in an in rem proceeding); *Local Loan Co. v. Hunt*, 292 U. S. 234 (1934) (injunction permitted where state suit would relitigate federal action); *United States v. Inaba*, 291 F. 416 (E. D. Wash., 1923) (injunction sought by the United States to protect and enforce a lien on crops it had reserved for payment of rent of leased land which it held as trustee).

12. *Supra*, note 7.

13. Section 265-Judicial Code of 1911, 28 U. S. C. Section 379 (1940) which stated "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

created exceptions and placing the responsibility for fashioning future exceptions to the statute's proscription upon the legislature, rather than upon the judiciary.¹⁴

In response to the *Toucey* decision and its implicit holding that the Anti-Injunction Act represented an *absolute ban* upon federal courts from enjoining state court proceedings, Congress in 1948, enacted Section 2283 of the Judicial Code, providing therein that:

"A Court of the United States may not grant an injunction to stay proceedings in a State Court except as authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Thus, by revising the Anti-Injunction Statute, Congress afforded the federal courts no latitude in creating exceptions to the statute's application. By creating three separate and specific exceptions, the revisers of the statute stated that:

"An exception to Acts of Congress relating to bankruptcy was omitted and the general exception substituted to cover *all* exceptions."¹⁵ (Emphasis supplied.)

Congressional intent to construe Section 2283 strictly against federal power was again recognized by this Court when, in *Richman Brothers*, the first significant interpretation of Section 2283 following its enactment, Mr. Justice Frankfurter, speaking for the majority, stated:

"We need not re-examine the series of decisions, prior to the enactment of Title 28 of the United States Code in 1948, which appeared to recognize implied excep-

14. See, J. Moore and H. Fink, *Judicial Code Pamphlet* 924 (1967); Comment, *Federal Injunctions Against State Actions*, 35 Geo. Wash. L. Rev. 744 (1967). Mr. Justice Frankfurter's decision in *Toucey* gives further support for this proposition when he stated, "The fact that one exception has found its way into section 265 is no justification for making another." 314 U. S. at 139.

15. *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, 515 (1955).

tions to the historic prohibition against federal interference with state judicial proceedings. *By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.*'¹⁶ (Citations omitted, emphasis supplied.)

The most recent affirmation of this principle occurred on June 8, 1970, in *Atlantic Coast Line Railway Company v. Brotherhood of Locomotive Engineers*,¹⁷ when this Court again strictly construed Section 2283 by holding that it is a "binding rule" on the power of the federal courts.

In *Atlantic Coast Line*, the Court considered the propriety of a federal court decision enjoining the enforcement of a state court's injunction against a union's picketing of the railroad's premises.

In holding the federal court injunction improper, this Court reaffirmed two fundamental propositions, both of which are at issue in the instant case. First, in laying to rest the Board's present contention concerning the applicability of the preemption doctrine as a bar to the state court injunction, it held that *the proscription of Section 2283 applies even though the state is wholly without jurisdiction over the subject matter of the dispute.*¹⁸ Moreover, *Atlantic Coast Line* again redefined the role to be played by the federal judiciary in deciding cases arising under Section 2283. In holding that the creation of further exceptions to the section's applicability was exclusively a congressional function, the Court, reaffirming its 1955 holding in *Richman Brothers*, stated:

16. *Id.* at 515 (1955).

17. 90 S. Ct. 1739 (1970).

18. In reaffirming this principle, first enunciated in *Richman Brothers*, Mr. Justice Black stated in *Atlantic Coast Line* that " . . . a federal court does not have inherent power to ignore the limitations of Section 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." (emphasis supplied) 90 S. Ct. 1739, 1747 (1970).

"This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions. Since that time (1955), Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that *any injunction against state court proceedings* otherwise proper under general equitable principles *must be based on one of the specific statutory exceptions to Section 2283* if it is to be upheld . . . the exceptions should not be enlarged by loose statutory constructions."¹⁹ (Citations omitted, emphasis supplied.)

It is in the context of this clear and continuous recognition by the Congress and the courts of the necessity to preserve the basic constitutional concept of a state judicial system free from federal court interference that the Board, while acknowledging that its action herein cannot find favor by virtue of application of any of the expressed exceptions to Section 2283, nevertheless contends that it should be insulated from the effect of the statute's proscription and be permitted to set aside a state court's decision when that decision is contrary to that which the Board considers a proper resolution of a labor controversy. In support of this position, the Board is contending that it is, for purposes of Section 2283, the United States Government and, therefore, a total exemption from the Section is applicable to it.²⁰

• 19. *Id.*, at 1743 (1970).

20. In support of its position, the Board relies on *N. L. R. B. v. Roywood Corp.*, 429 F. 2d 964 (C. A. 5, 1970) wherein the United States Court of Appeals for the Fifth Circuit concluded that the "governmental exception" to the prohibition of Section 2283 is applicable to the Board. In so holding, the court reversed a decision of the Federal District Court which had held that the Board's action seeking to enjoin the employer from enforcing a state court injunction could not be maintained, because the Board's jurisdiction had not been invoked and also because the Anti-Injunction Statute was a bar to the action (302 F. Supp. 167).

In reversing the lower court's decision, the Fifth Circuit found that (1) the jurisdiction of the Board had, in fact, been invoked; (2) notwithstanding the prohibition of Section 2283, the federal

II. The "United States as a Party" Exception Is Not Applicable to the Board.

Despite the fact that this Court had held that the Board, as an administrative agency, is a creation of and not the legal equivalent of the United States, and hence not privy to all the privileges and immunities bestowed on the

preemption in the area of labor law constituted a bar to the state court decree; and (3) the Board as an administrative agency of the Government was privy to the implied exception to Section 2283 given the United States when it sues as a party.

In addressing itself to the preemption question, however, the court ignored the clear and unambiguous holding of Mr. Justice Black in *Atlantic Coast Line*, that the preemption doctrine could not be applied as a means to circumvent the prohibition of Section 2283 (See footnote 18, and accompanying text, *supra*).

Moreover, the remainder of the court's discussion primarily focused on the invocation of the Board's jurisdiction pursuant to the employer's filing of unfair labor practice charges. While not stating so directly, this discussion established an arguable basis upon which the district court could have sustained the Board's action by application of the "in aid of its jurisdiction" exception to Section 2283. For in the event of a breach of the settlement agreement the Board is empowered to set aside the agreement and thereupon, pursuant to the dictates of Section 10(1) of the Act (29 U. S. C., Sec. 160(1)) is compelled to file a petition with the district court seeking to enjoin the union's unlawful activity. Therefore, if the state court decree were permitted to stand, then the district court would have been subjected to precisely that kind of restraint of its jurisdiction which this Court, in *Capital Service, Inc. v. N. L. R. B.*, 347 U. S. 501 (1954), sought to avoid.

"... the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully, it must first remove the state decree. When it did so, it acted 'where necessary in aid of its jurisdiction' ". 347 U. S. 505-506.

Yet, despite this substantial discussion concerning the Board's jurisdiction, the Circuit Court did not base its decision on this rationale. Rather, it held in a conclusionary manner and without any discussion of the reasons for its conclusion, that the Board, as an administrative agency of the Government was entitled to the governmental exception granted the United States as a party.

sovereign,²¹ the Board is asserting a contrary position in attempting to successfully maintain this action.

In addition to the three statutorily sanctioned exceptions to the statute, in 1957, this Court, in *Leiter*, sculptured one additional exception to the prohibition of Section 2283. It held that the Section's proscription could not be applied to the United States. In so deciding, the Court did not, however, abandon its prior decisions severely restricting the federal courts from emasculating the provisions of the Section. While the decision in *Leiter* evidenced a hesitancy to create a new exception to the clear language of the statute,²² the Court nevertheless felt that the threat of "irreparable injury to a national interest" and the "frustration of superior federal interests" which would result from precluding the United States as a plaintiff from obtaining a stay of state court proceedings warranted a narrow expansion of the exceptions to the Section's application.

In the decision below, the court, in holding that "... for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States" and that, therefore, the prohibition of "Section 2283 is applicable to the National Labor Relations Board"²³ recognized that it was not the intention of this Court in *Leiter* to reopen the

21. *Nathanson v. National Labor Relations Board*, 344 U. S. 25 (1952) held that a decision of the Board requiring an employer to make employees whole for back wages lost as a result of its discriminatory activity in violation of the Act constituted a valid debt owed the Board. However, contrary to the Board's contention, the Court held further that this debt was not entitled to preference under federal bankruptcy laws as would be a debt directly owed the United States.

22. "It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager ..." 352 U. S. 220, 226 (1957).

23. *N. L. R. B. v. Nash-Finch Company*, 434 F. 2d 971 (C. A. 8, 1970).

pre-1948 floodgates for judicial improvisation *vis a vis* Section 2283. Contrary to the Board's assertions, the lower courts recognized that the decision in *Leiter* cannot be viewed in a vacuum. It must be viewed both in the context of this Court's earlier pronouncements in *Toucey* and *Richman Brothers* that Section 2283 represents a clear expostulation of congressional intent to preserve the integrity of state court proceedings as well as the pronouncement by Mr. Justice Black, in *Atlantic Coast Line* that "the exceptions [to the Statute] should not be enlarged by loose statutory construction."²⁴

It is precisely this type of enlargement of the statute's exceptions, condemned by Mr. Justice Black, and inconsistent with *Toucey* and *Richman Brothers*, that would result if the Board's position is adopted. For the Board is not contending that the rationale of *Leiter* is exclusively applicable to the Board. Rather, the Board is predicating its position on its status as a United States Government administrative agency. Hence, any expansion of the "governmental exception" to include the Board, would, perforce include all other federal administrative agencies as well. Thus, all state court actions arguably related to the subject matter jurisdiction of any federal agency would be subject to similar interference to that here being attempted by the Board. No extensive exposition is needed to demonstrate the emasculation of the intent and purpose of Section 2283 which would result therefrom. It is the position of the National Chamber that, consistent with the above-described history of the statute, both Congressional and judicial, an exception of such far reaching consequence, if effected at all, should be effected only by Congress as the end product of its own consideration and debate and not by the courts in the absence of a clear congressional mandate.

The decision of the court below was soundly predicated on this principle, both in the instant case and in its 1956

24. 90 S. Ct. 1739, 1743 (1970).

decision in *N. L. R. B. v. Swift & Co.*,²⁵ upon which it based its instant decision.

In *Swift*, on facts markedly similar to those present herein, the Board sought an injunction in the federal district court to restrain the Company from enforcing a temporary restraining order obtained in the state court which, the Board claimed, enjoined peaceful picketing. Unable to fit its action into any of the statutorily expressed exceptions to Section 2283, the Board urged that as an agency of the United States it had acquired all the privileges and immunities of the United States and, therefore, it was not subject to the application of Section 2283. However, in disposing of this contention, the court, citing this Court's decision in *Reconstruction Finance Corporation v. J. G. Menihan Corp.*,²⁶ held that "the intention of Congress to bestow the privileges and immunities of the Government must be clearly demonstrated."²⁷

The rationale utilized in *Swift* is equally applicable here. Here, as in *Swift*, the Board has not demonstrated that it was Congress' intent to exempt it from the application of Section 2283. In the absence of such a showing, the Board's contention that, as an administrative agency of the United States, it is privy to the "governmental exception" expressed in *Lieter* cannot be sustained.²⁸

Moreover, the federal interests the Board is advancing herein are not those warranting an expansion of the *Leiter* doctrine. In *Leiter*, the Court held that the frustration of

25. 233 F. 2d 226 (C. A. 8, 1956).

26. 312 U. S. 81 (1941).

27. 233 F. 2d 226, 232 (1956).

28. This conclusion has found favor with Professor James Moore, who has written that "The principle excepting the United States from the bar of Section 2283 is inapplicable to governmental boards, agencies and corporations unless they can be properly equated to the sovereign." 1A. Moore, *Federal Practice*, 2314 (1965).

superior federal interests which would ensue from precluding the Federal Government from obtaining a stay of state court proceedings warranted an exception to the prohibitory statute. In its brief to this Court, the Board argues that not to include the Board under the umbrella of the "United States exception" would result in the kind of frustration of federal interests contemplated in *Leiter*.²⁹

In essence, the Board's argument can be reduced to a contention that because Congress invested the Board with exclusive jurisdiction over the subject matter of the underlying dispute involved herein, the federal preemption in the area³⁰ renders the state court wholly without jurisdiction over the subject matter of the dispute and thus warranted the imposition of a federal injunction to stay any action taken by the state court in excess of its jurisdiction. The court below, noting that the Board had unsuccessfully raised this contention in similar prior cases³¹ summarily disposed of its argument and reaffirmed the proposition that the expressed prohibition of Section 2283 could not be circumvented by application of the "preemption doctrine" even

29. See Petitioner's brief at page 11.

30. *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959).

31. E.g., *N. L. R. B. v. Swift & Co.*, 233 F. 2d 226 (C. A. 8, 1956); and *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U. S. 511, 515-516 (1955), in which, on facts markedly similar to those here presented, the Board appeared as *amicus curiae*. In *Richman*, as in the instant case, no charges had been filed with the Board concerning the subject matter of the dispute between the company and the union. Apparently aware then that the absence of this jurisdictional prerequisite precluded the Board from participating as a full party in the *Richman* case, it participated as *amicus curiae* in the losing cause.

Since the statutory requirement that a charge be filed alleging the commission of specific unfair labor practices before the Board's jurisdiction is invoked exists now as it did then, one can only posit that the passage of sixteen years alone, and not Congressional action, has emboldened the Board *sua sponte* to seek to exempt itself from this requirement.

when the doctrine would otherwise be unarguably applicable.³²

Moreover, it is submitted that notwithstanding the application of Section 2283 to the instant case, the preemption doctrine does not act as a jurisdictional bar to the action taken by the state court herein because the conduct of the union enjoined by the court was violent conduct—conduct over which, in the proper exercise of the state police power, the state court did, in fact, have jurisdiction.

In *San Diego Building Trades Council v. Garmon*, this Court established that “[W]hen an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted”.³³ However, *Garmon* did not impose a total ban upon the jurisdiction of the states in the area of labor law. Rather, *Garmon* defined the scope of permissible state activity in light of the policies embodied in the federal legislation. In *Garmon*, this Court defined three broad exceptions to the general rule. Thus, the states retain jurisdiction where (1) the regulated conduct is “marked by violence and imminent threats to the public disorder”; (2) the conduct “touched interests deeply rooted in local feeling and responsibility”; and (3) where the conduct was of

32. While acknowledging that the imposition by a state court into a federally preempted area itself presents “troublesome conflicts between Federal and state courts”, nevertheless, the courts and Congress have determined that these conflicts are less egregious to the continued maintenance of harmonious federal-state court relations than are conflicts engendered by the destruction of the integrity of state court proceedings resultant from interference with those proceedings by federal courts. Thus, “[t]he mere fact that a state court invades a field preempted by Congress and is wholly without jurisdiction does not create an exception to Section 2283.” 1A Moore, *Federal Practice*, 2324 (1965).

33. 359 U. S., at 245.

merely peripheral concern of the Labor Management Relations Act.³⁴

In determining the applicability of the preemption doctrine to any given state action, the fundamental inquiry is whether the state legislative or judicial action conflicts with federal policy to a sufficient degree to warrant suppression of the state action on the authority of the supremacy clause.³⁵

Therefore, while the *Garmon* rule admittedly carved out a defined segment from the broad continuum of activities over which the state and federal governments have concurrent power, it did not, however, eliminate the areas of such concurrent power.

Violent picketing and boycott activity, though an unfair labor practice and arguably subject to Section 7 or Section 8 of the Act, is an area which despite the preemptive limitations of the national labor policy is not beyond the jurisdiction of the state, acting pursuant to its police powers, to regulate.³⁶ A state court may, therefore, grant injunctive relief to prevent disturbance to the public order by violence, threats of violence, mass picketing, obstruction of streets or picketing of homes.³⁷

34. 359 U. S., 243-245.

35. *Swift & Co. v. Wickham*, 382 U. S. 111, 120 (1965); *San Diego Building Trades Council v. Garmon*, 359 U. S. 241-42 (1959).

36. *United Auto., Aircraft & Agricultural Imp., Workers v. Wisconsin Employment Relations Board*, 351 U. S. 266 (1956); *International Union, United Automobile, Aircraft & Agricultural Implement Workers v. Anderson*, 351 U. S. 959 (1956).

37. *Mine Workers, District 50, Construction Workers v. Laburnum Construction Co.*, 347 U. S. 656 (1954). This principle is true to such an extent and the interests of the state in protecting the public from such violent activity is so manifest that this Court has recognized the jurisdiction of state courts to enjoin *peaceful picketing* solely on the ground of the existence of past violent conduct on the part of the picketing union. *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 (1940).

As described, the activity which the state court enjoined in the instant case was not peaceful picketing and, therefore, pursuant to valid statutory authority and consonantly with the state's police power, was within the described exception to the *Garmon* rule and properly within the jurisdiction of the court to enjoin.

Moreover, subsequent to the *Garmon* decision, this Court has continuously recognized the vital interests of the states in regulating the area of labor and have expanded the areas in which the states exercise jurisdiction concurrently with the Board. For example, as described, this court has recognized the power of the states to regulate violent conduct even when such conduct is also subject to regulation under the Act. Subsequent to *Garmon*, this Court extended the area of concurrent jurisdiction to include the power to enjoin non-violent tortious conduct.³⁸ Further, in the area of the enforcement of collective bargaining agreements, this Court has recognized the concurrent jurisdiction of state courts to litigate unfair labor practice disputes where the existence of an unfair labor practice is determinative of whether the collective bargaining agreement has been breached.³⁹ In addition, this Court has also recognized the power of the state courts over actions brought by union members alleging the union's failure to take a grievance through arbitration.⁴⁰

38. E.g., *Linn v. United Plant Guard Workers, Local 114*, 383 U. S. 53 (1966) in which the "peripheral concern" and "overriding state interest" exceptions delineated in *Garmon* were utilized to uphold the jurisdiction of the state courts in defamation actions, and *Taggart v. Weinacker's*, 397 U. S. 233 (1970), in which a state court finding that a union violated state trespass laws in its picketing of a shopping center was upheld.

39. See, *Boys Markets, Inc. v. Retail Clerks*, 398 U. S. 235 (1970).

40. *Vaca v. Sipes*, 386 U. S. 171 (1967). In *Vaca*, this Court rejected the union's argument that the conduct before the state court, if true, was arguably an unfair labor practice and, therefore, within the exclusive jurisdiction of the Board and held that, pursuant to *Garmon's* expressed exceptions, an area of concurrent jurisdiction existed.

Thus, the United States Supreme Court has repeatedly undertaken the delicate task of affording the states maximum autonomy in labor relations regulation while still maintaining the integrity of a uniform national labor policy.

However, even assuming *arguendo* the clear applicability of the preemption doctrine and contrary to the rationale enunciated in *Leiter*, the courts have conclusively decided that when a conflict arises between the Board's interest in maintaining a uniform system of enforcement of federal labor law under its jurisdiction and the preservation of the integrity of the state courts within the framework of our nation's federalist system, the Board's interest must be subserviated.⁴¹

Notwithstanding this determination by the courts, the Board is asserting that any action taken by the state courts in the area of labor law should be subject to review by the Board and if, according to the Board, the state action is contrary to that which the Board, although not having the facts before it, as in the instant case, thinks warranted, it should be able to enjoin such actions. Implicit in the Board's position in this regard is the notion that the state courts are unable to effectively interpret applicable federal labor laws and render decisions that are not in conflict therewith. However, despite the Board's lack of confidence in the state courts, neither Congress—as evidenced by the fact that the Anti-Injunction Statute has, in some form, been in effect for 178 years—the lower federal courts, nor

41. Moreover, this principle is not altered by this Court's recent decision in *Motor Coach Employees v. Lockridge*, U. S.; 77 LRRM 2501 (1971) wherein the Court held that it is the underlying conduct giving rise to the court action and not the legal theory upon which the action is predicated that is critical in determining whether or not the preemption doctrine is applicable. In the instant case, it is the position of the National Chamber that even assuming *arguendo*, the otherwise clear applicability of the preemption doctrine pursuant to the *Garmon* as well as the *Lockridge* decisions, Section 2283 nevertheless serves as a bar to its application.

this Court have joined the Board in this lack of confidence. As expressed by this Court in *Richman Brothers*, and adhered to by the Eighth Circuit in *Swift*:

“... the state courts have for many years adequately protected Federal rights, and ... ‘The prohibition of Section 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.’ ”⁴²

Further, while, as described, the conflicts that might arise between the Board's jurisdiction of federal labor laws and the state court's consideration of cases arguably within that jurisdiction are not sufficient to warrant the inapplicability of Section 2283 to the Board, an opposite conclusion to that rendered in *Leiter* would have created a conflict not simply between the federal and state courts, but also between the state court and the United States Government—a conflict that ultimately could have resulted in a multiplicity of subsequent actions in the federal courts. For, assuming the state court had rendered a decision in favor of *Leiter* (who sought to have itself declared owner of mineral rights under land owned by the United States), then the United States, who would have been bound by the state court's judgment in a suit in which it was not a party would, unless it wished to give up the land, have to file an action in federal courts to quiet its title. Assuming the federal courts held for the United States, in opposition to the state court ruling, the United States would have had to file a subsequent action to oust *Leiter* and return possession of the land and mineral rights to its lessees. It is postulated that a desire to avoid this state-federal conflict and resultant multiplicity of actions and the critical need for the Government to protect its proprietary interest in land it owned and was in danger of losing that established the predicate for the Court's holding in *Leiter* and

42. 233 F. 2d 226, 230.

its decision to except the United States as a party from the prohibition of Section 2283.⁴³ No such conflict or proprietary interest on the part of the Board is involved in the instant case rendering it within the *Leiter* rationale.

Therefore, neither Congressional history, judicial decision, application of the preemption doctrine, nor this Court's rationale in *Leiter* supports the Board's position herein.

CONCLUSION.

For the foregoing reasons, as well as for those urged by the Respondent, the National Chamber urges this Court to affirm the decision of the court below.

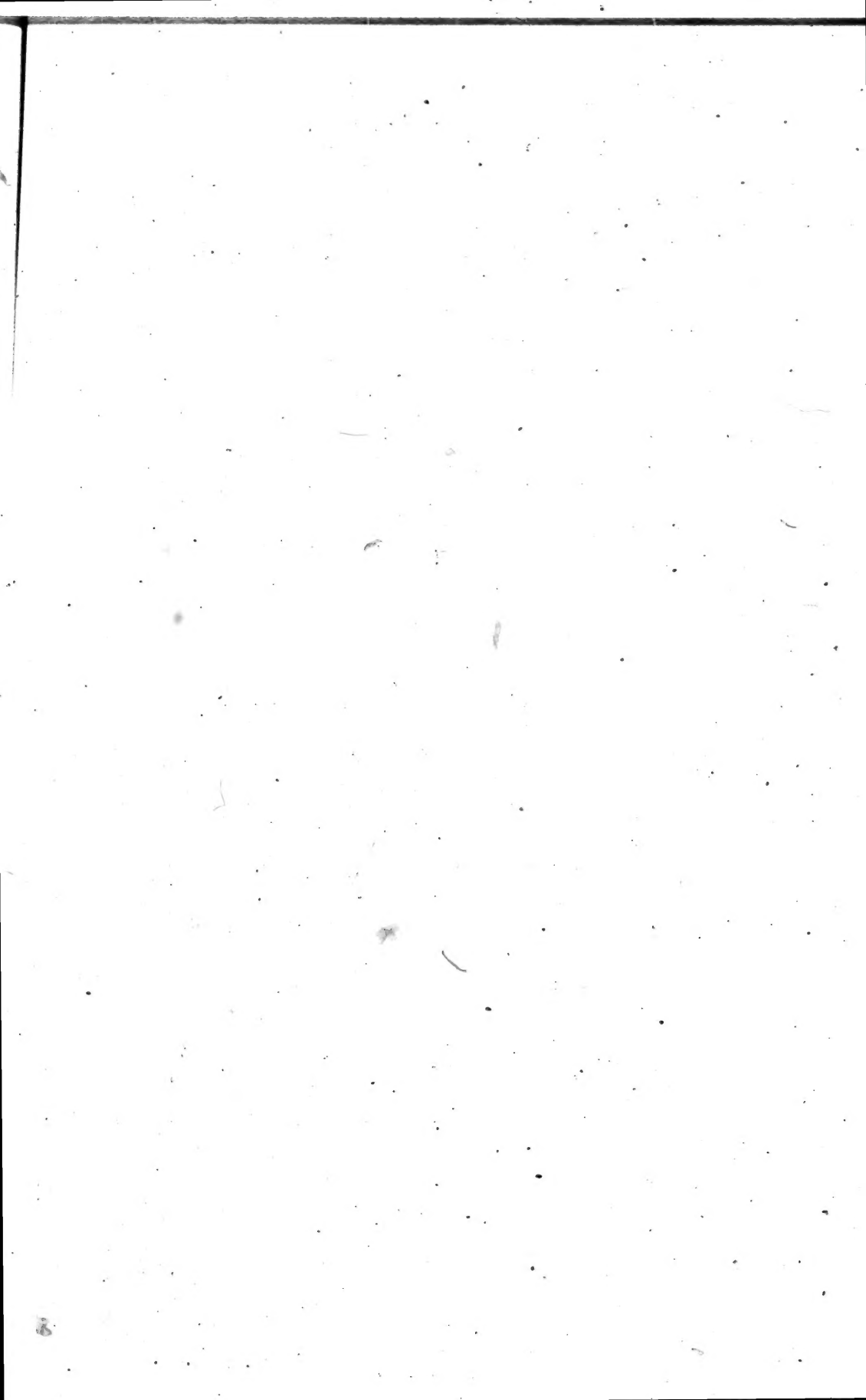
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43. Support for this interpretation of the meaning of the *Leiter* decision can be found in that decision itself. There, the Court stated, "the suit in the federal court was the only one that could finally determine the basic issue in the litigation. . . . The United States was not a party to the state suit and, under settled principles, title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding under the authority of the United States." 352 U. S., at 226.



In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-93

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT*

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This reply brief is directed to the Company's contention (Br. 6-14) that the picketing here was not peaceful and that therefore reversal of the court below would undermine the State's police power. This contention raises an issue which the court of appeals did not reach (A. 57, n. 3). Moreover, as we now show, it is based largely on unverified reports which are not part of the record, and misconstrues the relief the Board sought.

The Company contends (Br. 7) that the "picketing in the instant case was punctuated by numerous bomb threats, substantial numbers of nails in several store parking lots, the pouring of kerosene over fresh meat in display cabinets, and considerable property dam-

age * * *." It seeks to support this contention by reference to numerous complaints allegedly received by the police and fire departments. (Br. 7-9, ns. 6-11.) But there is no indication that anyone was ever convicted, or even arrested, for the acts complained of. Indeed, the Company concedes that "most of the activity referred to in the foregoing departmental records was committed by a person or persons unknown" (Br. 10).¹ Moreover, the acts which the Company now relies on were not even alleged in the affidavits which it filed in support of its prayer for injunctive relief (Br. 37-47). Accordingly, these acts, even if they occurred, cannot properly be used to characterize the picketing in this case.

In any event, the injunctive relief sought by the Board would not deprive the Company of State protection against acts of violence by pickets. The Board did not seek to nullify those portions of the State court injunction which limit the number of pickets or prohibit interference with entrance and egress or movement of traffic, but only those portions which restrained purely peaceful picketing (A. 33-34). Thus, the Company would be free to seek enforcement of the State court injunction against such misconduct as it describes in its brief. Cf. *Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 312 n. 4, 321 n. 10. As this Court has made clear, however, the State's power to enjoin mass or violent picketing does not permit it

¹ So far as appears, the single conviction for an unlawful act during the picketing involved one picket who was fined \$31 for shouting an obscenity at a Company customer (Br. 10, n. 13).

to ban peaceful picketing as well. See Bd. main brief, p. 34, n. 16.²

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded with directions to remand to the district court for consideration on the merits.

ERWIN N. GRISWOLD,
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PETER G. NASH,
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National Labor Relations Board.

SEPTEMBER 1971.

² The Company's extended discussion (Br. 14-16) of the Board's use of its injunctive power under Sections 10(j) and 10(l) of the Act has no relevance to the issues at hand; as pointed out in our main brief (pp. 29-30, n. 14), there was no means by which the Board could have invoked either of those provisions here.

NATIONAL LABOR RELATIONS BOARD *v.* NASH-
FINCH CO., DBA JACK & JILL STORES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 70-93. Argued October 19, 1971—Decided December 8, 1971

A union which had begun organizing respondent company's employees charged the company with unfair labor practices. The General Counsel of the National Labor Relations Board (NLRB) issued a complaint, which a Trial Examiner sustained, recommending that respondent be ordered to cease and desist from such practices. Before the NLRB acted, the union picketed respondent's stores and, respondent, contending that the union's action violated state law, sought and obtained an injunction from a state court limiting the union's picketing activities. Subsequently the NLRB issued an order accepting the Trial Examiner's recommendations and then brought this action in District Court to restrain enforcement of the state court injunction on the ground that it regulated conduct governed exclusively by the National Labor Relations Act. The District Court held that it was precluded from granting relief by 28 U. S. C. § 2283, which prohibits a federal court from enjoining state court proceedings except as authorized by Act of Congress "or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The court rejected the contention that the NLRB was within the exception recognized in *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, for suits brought by the United States. The Court of Appeals affirmed, holding that for purposes of § 2283, the NLRB is "an administrative agency of the United States, and is not the United States." *Held*:

1. Since the action here does not seek to restrain unfair labor practices against which the NLRB had issued its complaint but is based on the general doctrine of pre-emption, the exception in § 2283 for matters "necessary in aid of its jurisdiction" is inapplicable. *Capital Service, Inc. v. NLRB*, 347 U. S. 501, distinguished. Pp. 141-142.

2. For the purpose of preventing frustration of the National Labor Relations Act, the NLRB has an implied authority to obtain a federal injunction against state court action pre-empted by the

Act; such an injunction falls within the exception to § 2283 recognized in *Leiter Minerals, Inc.*, *supra*, for suits brought by the United States, and the fact that the party moving for an injunction is a federal agency and not the Attorney General is irrelevant. *Bowles v. Willingham*, 321 U. S. 503. Pp. 142-148.

434 F. 2d 971, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. WHITE, J., filed a dissenting opinion, *post*, p. 148, in Part I of which BRENNAN, J., joined, *post*, p. 156.

Lawrence G. Wallace argued the cause for petitioner. On the briefs were *Solicitor General Griswold*, *Peter L. Strauss*, *Dominick L. Manoli*, *Norton J. Come*, and *Peter G. Nash*.

William A. Harding argued the cause for respondent *pro hac vice*. With him on the brief was *Richard P. Nelson*.

Solomon I. Hirsh filed a brief for the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as *amicus curiae* urging reversal.

Milton A. Smith, *Jerry Kronenberg*, and *Gerard C. Smetana* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Title 28 U. S. C. § 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The question is whether the National Labor Relations Board may, through proceedings in a federal court, en-

join a state court order which regulates peaceful picketing governed by the federal agency. The District Court rejected the Board's contention that it is within the exception to § 2283,¹ recognized in *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, as respects suits brought by the United States. The Court of Appeals affirmed. 434 F. 2d 971. The case is here on a petition for a writ of certiorari which we granted, 402 U. S. 928.

When a union began organizing employees of certain stores in Grand Island, Nebraska, the union filed unfair labor practice charges against the company. The General Counsel issued a complaint. A hearing was held and a Trial Examiner sustained the complaint and recommended that the company cease and desist. Shortly thereafter and before the Board had acted, the union picketed the stores. The company thereupon petitioned the Nebraska state court for an injunction. The state court issued a restraining order, limiting the pickets to two at each store, enjoining them from blocking or picketing entrances or exits and from distributing literature pertaining to the dispute which would halt or slow traffic, from instigating conversations with customers in any manner relating to the dispute, from mass picketing, and acts of physical coercion against persons driving to work, and from doing any act in violation of Neb. Rev. Stat. § 28-812, which makes unlawful "loitering about, picketing or patrolling the place of work . . . against the will of such person." The injunction also bans anyone other than a bona fide union member from picketing unless he becomes a defendant in the state proceedings. Finally, the injunction bars anyone, other than pickets and named defendants, from picketing, distributing handbills, or otherwise "caus[ing] to be pub-

¹ For the history of present § 2283 see H. R. Rep. No. 308, 80th Cong., 1st Sess., A181.

lished or broadcast any information pertaining to the dispute . . . between the parties."

Later the Board entered its decision and order accepting in part the Trial Examiner's recommendations and rejecting parts not material to the present controversy.

The Board then filed this suit in the Federal District Court seeking to restrain the enforcement of the state court injunction on the ground that it regulated conduct which was governed exclusively by the National Labor Relations Act. As noted, both the District Court and the Court of Appeals denied the Board relief. The Court of Appeals held that for the purposes of § 2283 the Board is "an administrative agency of the United States, and is not the United States." 434 F. 2d, at 975. Congress from the beginning has restricted the authority of the federal judiciary to interfere with state court actions. See *Younger v. Harris*, 401 U. S. 37, 43-44. The present § 2283 is a revision of earlier provisions of federal statutes which were construed to allow within limits such federal injunctions in favor of *federal agencies*. *Bowles v. Willingham*, 321 U. S. 503, 510. Any exception in favor of federal agencies must, however, be "implied," *ibid.*, unless it comes within the exceptions stated in § 2283.

It is suggested that this federal injunction was "in aid" of the jurisdiction of the federal court since the suit is in the District Court by reason of 28 U. S. C. § 1337 which grants jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce." In *Capital Service, Inc. v. NLRB*, 347 U. S. 501, an employer invoked the aid both of a state court and of the federal Board against picketing. The Board sought a federal court injunction under § 10 (1) of the Act, 29 U. S. C. § 160 (1), which specifically allows it wherever an unfair labor practice respecting a secondary boycott or picketing violative of § 8 (b) (4) or § 8 (b) (7)

of the Act is involved. We ruled that the state injunction "restrains conduct which the District Court was asked to enjoin in the § 10 (1) proceeding." *Id.*, at 505. We held that under those circumstances an injunction by the federal court was "necessary in aid of its jurisdiction" over commerce, because the federal court to exercise its jurisdiction "freely and fully" must "first remove the state decree." *Id.*, at 506.

In the instant case the company did not file any charges with the Board which claimed that the union's picketing violated § 8 (b)(4) or § 8 (b)(7) of the Act, 73 Stat. 542 and 544, 29 U. S. C. § 158 (b)(4) and § 158 (b)(7).

Section 10 (j) gives the District Court similar authority in respect of an unfair labor practice of the employer under § 8 (a)(1) of the Act which protects the right of employees to organize. But a resort to court action, the Board has held, does not violate § 8 (a)(1). See *Clyde Taylor Co.*, 127 N. L. R. B. 103, 109.

The action in the instant case does not seek an injunction to restrain specific activities upon which the Board has issued a complaint but is based upon the general doctrine of pre-emption. We therefore do not believe this case falls within the narrow exception contained in § 2283 for matters "necessary in aid of its jurisdiction." There is in the Act no express authority for the Board to seek injunctive relief against pre-empted state action. The question remains whether there is implied authority to do so.

It has long been held that the Board, though not granted express statutory remedies, may obtain appropriate and traditional ones to prevent frustration of the purposes of the Act. We held in *In re National Labor Relations Board*, 304 U. S. 486, 496, that even in the absence of an express statutory remedy, the Board might petition for writ of prohibition against premature invo-

cation of the review jurisdiction of the Court of Appeals. In *Amalgamated Workers v. Edison Co.*, 309 U. S. 261, we held that the Board had implied authority to institute contempt proceedings for violation of court decrees enforcing orders of the Board. In *Nathanson v. NLRB*, 344 U. S. 25, we found an implied authority of the Board to file claims in bankruptcy covering the sums included in its back-pay awards. The claims were not given priority under § 64 (a) (5) of the Bankruptcy Act, but this was because "the United States [was] collecting for the benefit of a private party," *id.*, at 28, not as suggested; *post*, at 149, because the Board's juridical status was something less than that of the United States.²

² The basis of our decision in *Nathanson* was that "[t]he priority granted by [§ 64 (a) (5), 11 U. S. C. § 104 (a) (5)] . . . was designed 'to secure an adequate revenue to sustain the public burthens and discharge the public debts.'" 344 U. S., at 27-28. Because there was "no function . . . of assuring the public revenue" and "[t]he beneficiaries of the claims [were] private persons," *id.*, at 28; we found it inappropriate to apply the priority for claims owing the United States and, instead, gave the claims the same "treatment tha[t] other wage claims enjoy[ed]." *Id.*, at 29. The suggestion that *Nathanson* is a stronger case for equating the status of the Board to that of the United States disregards both the policies of the Bankruptcy Act upon which we relied in that decision and the federal pre-emption which inheres in the present case.

Cases such as *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, do not support a miserly interpretation of the Board's powers. There, we held that costs of litigation could be assessed against a corporation which Congress had launched into the commercial world with the power to "sue and be sued." Contrary to the dissent's assertion that the case turned on the failure of Congress to manifest an intent "to bestow the privileges and immunities of the United States on a federal agency," *post*, at 150, our decision there was based upon the grant of "the unqualified authority to sue and be sued [which] placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." 312 U. S., at 85-86.

We conclude that there is also an implied authority of the Board, in spite of the command of § 2283, to enjoin state action where its federal power pre-empts the field. Our starting point is contained in the observation of Chief Justice Hughes in *Amalgamated Workers v. Edison Co.*, *supra*, at 265.

"The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."

The purpose of the Act was to obtain "uniform application" of its substantive rules and to avoid the "diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Garner v. Teamsters Union*, 346 U. S. 485, 490. The federal regulatory scheme (1) protects some activities, though not violence (see *United Mine Workers v. Gibbs*, 383 U. S. 715, 729-731), (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces. We said in *Garner v. Teamsters Union*, *supra*, at 500:

"For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

In *Leiter Minerals, Inc. v. United States*, 352 U. S. 220, a state suit over mineral rights in public lands was pending, the parties being private persons. The United States brought suit in the federal court to quiet title to the mineral rights and sought and obtained a federal injunc-

tion against prosecution of the state proceedings. In holding that § 2283 impliedly allowed such an exception we said:

"The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U. S. C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U. S. C. § 2283 alone." *Id.*, at 225-226.

In *Leiter*, the United States brought suit under the authority of the Attorney General. Here it is the Board that moved to prevent "irreparable injury to a national interest." The Board is the sole protector of the "national interest"³ defined with particularity in the Act. *Leiter*, of course, was initiated by the Attorney General; but underlying the controversy were federal agencies in the Department of the Interior responsible for administration of the public lands. The fact that the moving party is a federal agency, not the Attorney General, was

³ *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 511, held that a private party under the protection of the Board's order could not obtain injunctive relief in a federal court against an anti-picketing order issued by a state court. And see *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281.

considered irrelevant in *Bowles v. Willingham*, *supra*, where the Administrator of the Emergency Price Control Act sued to enjoin a state court from interfering with orders of the federal agency. An exception from the general ban on federal injunction against state court action was implied by reason of the fact that the method of review of the orders of the federal agency was in the Emergency Court of Appeals. But there was no suggestion that suit by or against the Administrator was not a suit of the United States.⁴ The purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights. We can no more conclude here than in *Leiter* that a general statute, limiting the power of federal courts to issue injunctions, had as its purpose the frustration of federal systems of regulation. See *Brown v. Wright*, 137 F. 2d 484, 488. The frustration of superior federal interests by the general language of § 2283 cannot reasonably be imputed. See *NLRB v. Sunshine Mining Co.*, 125 F. 2d 757, 762; *NLRB v. New York State Board*, 106 F.

⁴ Actions against the National Labor Relations Board are dismissed on the ground that they are against a federal agency exercising a governmental regulatory function and so are suits against the United States which cannot be sued without the consent of Congress. *Clover Fork Coal Co. v. NLRB*, 107 F. 2d 1009. The same holds for the Atomic Energy Commission, *Cotter Corp. v. Seaborg*, 370 F. 2d 686; the Civil Service Commission, *Soderman v. U. S. Civil Service Commission*, 313 F. 2d 694; the Veterans Administration, *Evans v. U. S. Veterans Admin. Hospital*, 391 F. 2d 261; the Securities and Exchange Commission, *Holmes v. Eddy*, 341 F. 2d 477. Similarly, an action by the Director General of Railroads was held to be on behalf of the United States and thus was not barred by the relevant statute of limitations. *Davis v. Corona Coal Co.*, 265 U. S. 219.

Supp. 749, 752; *NLRB v. Industrial Commission*, 84 F. Supp. 593, aff'd, 172 F. 2d 389.

The fact that the Board is given express authority to seek enforcement of its orders in some sections of the Act⁵ is not persuasive that the Act expresses a policy to bar the Board from enforcing the national interests on other matters. The instances where the Board is given explicit authority to seek the aid of federal courts are not exclusive examples, as we have already shown. They are only particularized instances of specific enforcement devices relating to specified orders, not a denial by implication that the Act and the Board would not be entitled to federal aid or protection in other instances, as illustrated by *In re National Labor Relations Board*, *supra*; *Amalgamated Workers v. Edison Co.*, *supra*; and *Nathanson v. NLRB*, *supra*. The exclusiveness of the federal domain is clear; and where it is a public authority that seeks protection of that domain, the way seems clear. For the Federal Government and its agencies, the federal courts are the forum of choice. For them, as *Leiter* indicates, access to the federal courts is "preferable in the context of healthy federal-state relations." 352 U. S., at 226.

Whether there are parts of the state court injunction

⁵ Congress has vested the Board with broad powers to seek injunctive relief in the district courts. Section 10 (l), 29 U. S. C. § 160 (l), for example, gives the Board power to obtain an injunction where an investigation produces reasonable cause to believe that a charge of secondary boycott or illegal picketing activity is true. Section 10 (j), 29 U. S. C. § 160 (j), provides a similar basis of power for other unfair labor practices. "In case of contumacy or refusal to obey a subpoena issued to any person" during "hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of [its] powers" under §§ 9 and 10, 29 U. S. C. §§ 159 and 160, the Board may seek injunctive relief from a district court requiring compliance. 29 U. S. C. § 161 (2).

that should survive our reversal of the judgment below is a question we do not reach. It will be open on the remand of the cause.

Reversed and remanded.

MR. JUSTICE WHITE, dissenting.

I

The National Labor Relations Board here sues in federal court to enjoin the enforcement of a state court injunction against picketing.¹ 28 U. S. C. § 2283 bars such injunctions except in specified situations. One exception permits injunctions by a federal court which are "necessary in aid of its jurisdiction." The majority rightfully concedes that this exception is inapplicable

¹ Although the Board had held an unfair labor practice hearing and had found the employer guilty of certain unfair labor practices while exonerating it of others, this proceeding is not relevant to the issues in the present case because it did not concern the union's picketing. The union had originally filed a complaint and an election petition with the Board, charging the employer with a refusal to bargain and with interfering with the employees' rights to organize. A complaint was issued, and a hearing held. The trial examiner on April 28, 1969, found the employer guilty of certain § 8 (a) (1) and § 8 (a) (5) unfair labor practices and entered a cease and desist order against certain activities of the employer. A month after the trial examiner's decision, the union began its picketing, and the employer then secured the state court injunction limiting the picketing that is at issue in this case. On August 29, 1969, the Board filed a complaint in federal district court seeking to restrain the employer from enforcing the state court injunction. On September 17, 1969, the Board reversed the decision of the trial examiner and held that the employer was not guilty of a § 8 (a) (5) refusal to bargain nor of certain of the § 8 (a) (1) violations the trial examiner had found, but it found the employer guilty of certain other § 8 (a) (1) infractions and entered a limited cease-and-desist order. Although the picketing occurred contemporaneously with the § 8 (a) (1) and § 8 (a) (5) unfair labor practice proceeding, it was never an issue before the Board.

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WHITE, J., dissenting

here. A state court injunction in no way interferes with the Board's admitted power to prevent unfair labor practices or to secure federal injunctions in those situations specifically identified by Congress. *Capital Service, Inc. v. NLRB*, 347 U. S. 501 (1954), amply protects the Board's power to enjoin state court proceedings where an unfair labor practice is in progress and the jurisdiction of a federal court might later be invoked, but no such Board adjudication was occurring here concerning the picketing. *Capital Service* is not controlling.

Leiter Minerals, Inc. v. United States, 352 U. S. 220 (1957), held that the restrictions of § 2283 do not apply to the Federal Government. The Board identifies itself with the United States and therefore asserts that § 2283 is inapplicable to it. I cannot agree. The juridical status of the Board is not perfectly congruent with that of the United States. For example, although it may file claims for back pay in bankruptcy proceedings, it does not enjoy the priority accorded to debts owing to the United States. *Nathanson v. NLRB*, 344 U. S. 25 (1952).² *Leiter Minerals* had nothing to do with the cir-

² In *Nathanson*, as here, the Board was attempting to protect the § 7 rights of private parties. If anything, the situation in *Nathanson* was a much stronger one for equating the status of the Board to that of the United States, since there the Board was seeking to enforce a back pay award (by filing a proof of claim against the employer, who had become a bankrupt, and asserting that its back pay order was entitled to the priority of a debt owing the United States under § 64 (a) (5) of the Bankruptcy Act, 11 U. S. C. § 104 (a) (5)) which it had assessed after adjudicating the employer guilty of a § 8 unfair labor practice. The Board was thus clearly discharging a designated statutory function, as distinguished from the instant case where the Board's jurisdiction to evaluate the disputed picketing in an unfair labor practice proceeding is totally unclear. The Court held, however, that "[i]t does not follow that because the Board is an agency of the United States, any debt owed it is a debt owing the United States" under the Bankruptcy Act, 344 U. S., at

cumstances in which an agency such as the NLRB should be treated as the United States; nor does that case purport to modify the rule of *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, 85 (1941), that the intention of Congress to bestow the privileges and immunities of the United States on a federal agency must be clearly manifest.³ The authority of the Federal Government to secure an injunction in *Leiter Minerals* was implied under the judicial rule that a statute that divests pre-existing rights or privileges will not be applied to the sovereign in the absence of explicit language. 352 U. S., at 224. In the instant case, however, we deal with a statutorily defined agency created after the passage of § 2283 and possessing certain specified injunctive powers. The Board can claim no residual sovereignty such as that which was held in *United States*

27, and it disallowed the asserted priority on the ground that the function of the precedence given the United States under the Bankruptcy Act was to insure the collection of claims that had accrued to the public fisc. The majority's attempt to distinguish *Nathanson* is less than convincing.

³ Both *Menihan* and the present case present the question of whether a governmental agency is clothed with a particular attribute of sovereignty: in *Menihan*, an exemption from payment of costs after unsuccessful litigation under Fed. Rule Civ. Proc. 54 (d) which was afforded to "the United States, its officers, and agencies . . . to the extent permitted by law," in the present case, an implicit exemption from § 2283. The Court emphasized that because the doctrine of sovereign immunity gives the Government a privileged position, it has been "appropriately confined," 312 U. S., at 84, and noted that "the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work." *Ibid.*, quoting *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 388 (1939). Since "there is no presumption that the agent is clothed with sovereign immunity," 312 U. S., at 85, the Court examined the statute establishing the RFC and concluded that there was no affirmative indication by Congress that it had meant to exempt the RFC from paying costs after it had lost a law suit.

v. *United Mine Workers*, 330 U. S. 258, 272-273 (1947), to exempt the United States Government from the restrictions of the Norris-LaGuardia Act, and by a familiar rule of statutory construction, the enumeration of its injunctive powers should be held to preclude the existence of other powers.⁴ In light of the congressional disinclination to authorize anything more than extremely limited interferences with state court proceedings by federal courts, and in view of this Court's reluctance to approve such interference by way of the equitable powers of federal courts, *Younger v. Harris*, 401 U. S. 37, 43-45 (1971); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U. S. 281, 286 (1970), implicit exceptions from § 2283 are at best suspect.

Section 2283 clearly permits injunctions against state court proceedings if "expressly authorized by Act of Congress." There is no claim here that the injunction sought by the Board is expressly authorized by any statute. Indeed, it is admitted that express authorization is lacking, and we are asked to imply such power. The Court does so, but its holding ignores both the language and the traditional interpretation of § 2283 and is inconsistent with the regulatory scheme of the LMRA.

Section 8 of the National Labor Relations Act, as amended by the Labor Management Relations Act, specifies unfair labor practices by employers and unions. Section 9 provides for Board determination of bargaining units and employee representatives. Section 10 specifies the procedures to be employed in preventing unfair labor practices prohibited by § 8. Two aspects of § 10 are critical here. First, the Board is not granted unqualified powers to enforce the Act. The statute conditions Board

⁴ This rule has been frequently recognized by the Court, *United States v. De la Maza Arredondo*, 6 Pet. 691, 724 (1832); *Kendall v. United States*, 107 U. S. 123, 125 (1883); *Neuberger v. Commissioner of Internal Revenue*, 311 U. S. 83, 88 (1940).

action against unfair labor practices upon the filing of a charge; it may not act on its own motion. The requirement is jurisdictional. *Montgomery Ward & Co. v. NLRB*, 385 F. 2d 760, 763 (CA8 1967); *Texas Industries, Inc. v. NLRB*, 336 F. 2d 128, 132 (CA5 1964); *Int'l Union of Electrical, Radio & Machine Workers v. NLRB*, 110 U. S. App. D. C. 91, 94, 289 F. 2d 757, 760 (1960); *Consumers Power Co. v. NLRB*, 113 F. 2d 38, 41-43 (CA6 1940); *NLRB v. Hopwood Retinning Co.*, 98 F. 2d 97, 101 (CA2 1938); *NLRB v. National Licorice Co.*, 104 F. 2d 655, 658 (CA2 1939), modified on other grounds, 309 U. S. 350 (1940); *Douds v. Int'l Longshoremen's Assn.*, 147 F. Supp. 103, 108 (SDNY 1956), aff'd, 241 F. 2d 278 (CA2 1957). See also *National Licorice Co. v. NLRB*, 309 U. S. 350, 369 (1940). The Board has no roving, unqualified power to prevent unfair labor practices or to enforce the provisions of § 7 declaring that employees shall have the right to organize, bargain collectively, and otherwise engage in concerted activities. In the case before us, no unfair labor practice charge arising out of the union's picketing has been filed, either by the union or by the employer. Yet the Board appeared in a federal court seeking an injunction seemingly aimed at protecting employee rights guaranteed by § 7.

Second, after a charge has been filed and an unfair labor practice complaint has been issued the Act grants the Board the power to seek "appropriate temporary relief or restraining order" from the courts. § 10 (j). Further, § 10 (l) specifies in even greater detail the circumstances under which temporary injunctions may be secured when charges under §§ 8 (b) (4) (A), 8 (b) (4) (B), 8 (b) (4) (C), 8 (e), or 8 (b) (7) have been filed with the Board. Sections 10 (e) and 10 (f) define the powers of the Board and the courts to issue injunctions in connection with enforcement of Board orders after unfair labor practices have been adjudicated

by the Board. Nowhere in the statute is there a provision authorizing the Board to seek injunctions prior to the filing of unfair labor practices or the issuance of a complaint. Nowhere is the Board authorized to use the injunctive power to enforce § 7 rights, except in connection with adjudicating unfair practices. Congress specified the powers of the Board with some care, particularly its powers to seek injunctions. Manifestly, Congress was aware of its longstanding policy against indiscriminate injunctions in labor disputes; for in § 10 (h) it exempted from the Norris-LaGuardia Act only those situations where the courts are "granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, *as provided in this section . . .*" (Emphasis added.) On the floor of the Senate, Senator Smith answered the contention that the passage of § 10 (1) would weaken the Norris-LaGuardia Act:

"The only comment I can make on that statement is that we were very careful in this bill to protect the injunctive process as it is protected in the Norris-LaGuardia Act, except in exceptional cases where the Government has to step in. In national paralysis cases we permit the Attorney General to step in, and in the boycott and jurisdictional strike cases we permit the National Labor Relations Board to step in; *and there is no other approach to the courts for injunction except in those two situations.*" 93 Cong. Rec. 4283. (Emphasis added.)

In such a context, today's decision is improvident. As a statutory matter under the Labor Management Relations Act, the Board has no power to seek the injunction it now demands even absent the barriers established by § 2283. And under that section, it is error to clothe the

agency with the exception applicable to the United States. When an agency of the United States, rather than the United States itself, is plaintiff in an injunction action, the specific exceptions to § 2283 should be deemed controlling, particularly that exception directing inquiry to whether the injunction is "expressly authorized by Act of Congress." Here it is plain to me that the Board has no such power as it now claims to have, and I would affirm the judgment below.

II

A few additional words are appropriate. Even if, contrary to my view, the Board has power to seek an injunction to prevent interference with § 7 rights absent an unfair labor practice charge, it should not be able to obtain equitable relief by the mere conclusory allegation that such rights are "arguably" protected under the LMRA. Although § 7 rights must be interpreted according to federal law, "Congress has not federalized the entire law of labor relations," *Motor Coach Employees v. Lockridge*, 403 U. S. 274, 309 (1971) (WHITE, J., dissenting), nor has it wholly displaced state and federal courts in the administration of federal labor policy.

The employer in this case was subjected to picketing that it thought illegal and unprotected. It sought and was granted a state court injunction over protests that state judicial power was pre-empted by federal law and the exclusive jurisdiction of the NLRB. Rather than allowing the union to appeal the injunction through the state court system, and to this Court if necessary, as the union would ordinarily have to do, *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, *supra*, the Court today permits the Board to short-circuit that process by securing a federal injunction, solely upon allegations that the conduct of the union was arguably protected under federal law and was within the

exclusive jurisdiction of the NLRB. The Board does not, however, intimate what provisions of the LMRA the union was violating in picketing this employer. It does not assert the existence or imminence of an unfair labor practice by either side in connection with the picketing. It suggests no way in which the employer could secure an adjudication of whether the union's conduct was protected under federal law. It does not indicate what "superior federal interests" the state decree frustrated. Absent an unfair labor practice charge and complaint, the Board itself has no jurisdiction at all, let alone exclusive jurisdiction, to hold hearings and issue cease-and-desist orders to prevent interference with § 7 rights in situations like this.

Congress' swift overruling of the Court's decision in *Guss v. Utah Labor Relations Bd.*, 353 U. S. 1 (1957), by passage of NLRA § 14 (c), 73 Stat. 541, 29 U. S. C. § 164 (c), should make the Court approach with great caution the creation of another "vast no-man's land, subject to regulation by no agency or court." *Id.*, at 10. The NLRA was not enacted in a void and its strictures presuppose a certain degree of state authority and regulation:

"A holding that the States were precluded from acting [to enforce their trespass laws against invasions of private property] would remove the backdrop of state law that provided the basis of congressional action but would leave intact the narrower restraint present in federal law through § 7 and would thereby artificially create a no-law area." *Taggart v. Weinacker's, Inc.*, 397 U. S. 223, 228 (1970) (BURGER, C. J., concurring) (emphasis in original).

The Board should not, therefore, be able to obtain an injunction by merely alleging that conduct is "argu-

ably protected" by the LMRA. This rationale for pre-empting the applicability of state law and the authority of state courts developed to protect the exclusive jurisdiction of the Board. *Int'l Longshoremen's Assn., Local 1416 v. Ariadne Shipping Co.*, 397 U. S. 195, 201 (1970) (WHITE, J., concurring); *Taggart v. Weinacker's, Inc.*, *supra*, at 227-228 (BURGER, C. J., concurring). Where the Board is itself not only unwilling but apparently powerless to move against the challenged conduct, this rationale is a species of federal overkill, pre-empting the field to protect nothing. Of course, federal law remains paramount in its own arena, but if the Board has power to enforce it in this situation, it should be required to prove its case before obtaining an injunction and should demonstrate that federal law has been violated and that equitable relief is necessary to prevent its frustration. An unwarranted and illogical lacuna in the legal regulation of labor-management relations should not be extended. The Board should not be entitled to an injunction against state court proceedings unless it persuades a federal court that the state decree is actually interfering with rights protected by federal law.

MR. JUSTICE BRENNAN would affirm the judgment of the Court of Appeals for the reasons stated in Part I of the dissenting opinion of MR. JUSTICE WHITE.

